Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JERRY BRYAN KEITH,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED

QUESTION NO. ONE: More than one month before any proceedings were held in this case, the trial judge told the jurors in an unrelated case that there were facts that could not be brought up in that case, that the state had a much stronger case in the next case, that Petitioner would be convicted in the next case and go to prison. The Fifth Circuit granted a COA on this one issue but ultimately denied the writ. Since there hadn't been any proceedings in the second case, do the judge's comments:

(1) demonstrate an extra-judicial exposure to the facts of the second case,

(2) demonstrate such prejudice against Petitioner as to preclude the judge from presiding at the second trial, or

(3) prove that the judge had pre-judged Petitioner's guilt in the second case?

If so,

(4) was Keith denied the fair trial guaranteed him by the 14th Amendment,

(5) was the judge constitutionally disqualified from presiding at the second trial, and

(6) was this a structural error, not subject to a harmless-error analysis?

QUESTION NO. TWO: Petitioner's state writ of habeas corpus asserted other federal constitutional questions,

QUESTIONS PRESENTED – Continued

including ineffective assistance of counsel and Confrontation Clause issues – issues that were not raised on direct appeal. The trial court took no action on the writ other than to forward the writ to the Texas Court of Criminal Appeals – without the portion of the writ that raised the question of judicial bias. The Texas Court of Criminal Appeals denied the writ without written order. Other than this denial, there is nothing in the state courts that addresses the grounds raised in the writ of habeas corpus that could be looked at to determine the basis for the denial or the logic used. The District Court denied the writ and denied a COA on all issues raised in federal court. The Fifth Circuit denied a COA on all issues except judicial bias.

(1) Was the Court of Criminal Appeals' denial a "decision on the merits" or a harmful-error analysis, entitled to deference under AEDPA so as to preclude a de novo review by federal habeas corpus? If not, what is the standard of review to be applied to the federal writ? [*Chapman v. California*, 386 U.S. 18 (1967)'s beyond a reasonable doubt, or *Brecht v. Abrahamson*, 507 U.S. 619 (1993)'s substantial and injurious effect?]

(2) Is the decision of the Court of Criminal Appeals contrary to, or an unreasonable application of clearly established Federal law or based on an unreasonable determination of facts in light of the evidence presented in the state court proceedings? And,

(3) Was the denial of the COA by the District Court and the Fifth Circuit contrary to clearly established law and debatable among jurists of reason?

QUESTIONS PRESENTED – Continued

QUESTION NO. THREE: In denying the COA, the Fifth Circuit: (1) ignored the impact that the destruction of the original interview notes had on the ability of Petitioner to cross-examine the caseworker and the child witnesses and focused on the injurious effect on the verdict, contrary to *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); (2) did not examine the failure of the state to preserve evidence that it created when it improperly interviewed the children; (3) denied the claim relating to the prosecutor's misconduct – including his request that Petitioner be convicted for criminal allegations on which Petitioner was already acquitted, and that this misconduct denied him a fair trial. *Donnelly v. DeChristoforo*, 476 U.S. 637 (1974); (4) prejudged the merits of Petitioner's constitutional claims without the opportunity for full briefing being afforded to Petitioner, without focusing on the debatability of the constitutional issues presented and (5) Petitioner presented controlling case law that is materially indistinguishable from Petitioner's claim of ineffective assistance of counsel. Did Petitioner thereby make a substantial showing of a denial of constitutional rights and satisfy the "debatability" or "wrong" clauses of 28 U.S.C. § 2253(c)? *Miller-El v. Cockrell*, ___ U.S. ___, 123 S.Ct. 1029 (2003). If so, was Petitioner entitled to a COA on the issues on which a COA was denied him?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS INVOLVED 3

I. U.S. CONSTITUTION, amend. 6. 3

II. U.S. CONSTITUTION, amend. 14, section 1. ... 3

STATEMENT OF THE CASE 3

I. Nature of the Case 3

II. Procedural Background 4

III. Facts 5

REASONS FOR REVIEW 11

Reason 1: The Circuit Courts of Appeals disagree as to what constitutes "adjudicated on the merits" and whether the pre-AEDPA standard applies if the state court is silent on its logic and reasoning in the adjudication of the constitutional claims 11

Reason 2: If a state court does not adjudicate a constitutional claim on the merits, or apply a harmful-error analysis, which controls – *Chapman's* beyond a reasonable doubt or *Brecht's* substantial and injurious effect? 13

TABLE OF CONTENTS – Continued

Page

Reason 3: The Fifth Circuit's holding that the trial judge's extra-judicial exposure to the facts of a second case and his pre-judgment of Petitioner's guilt in the second case was not constitutionally disqualifying and subject to a "harmless-error" analysis, conflicts with prior decisions of this Court 14

Reason 4: The Fifth Circuit's decision that judicial bias in a criminal case is analyzed by whether there was an appearance of impropriety that rose to the level of a fundamental defect resulting in a complete miscarriage of justice conflicts with prior decisions of this Court that constitutionally disqualify a judge who prejudges guilt 14

Reason 5: Petitioner should have been granted a COA because he made a substantial showing of a denial of constitutional rights 17

Confrontation Rights 17

Prosecutorial Misconduct 19

Ineffective Assistance of Counsel 21

Debatable Among Jurists of Reason 24

Reason 6: The Fifth Circuit applied the wrong standard in denying Petitioner's request for a COA and in denying the writ of habeas corpus on the issue of judicial bias 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Abnor v. State, 871 S.W.2d 726 (Tex. Crim. App. 1994) 23

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 14

Arizona v. Fulminante, 499 U.S. 279 (1991) 2, 16

Arizona v. Youngblood, 488 U.S. 51 (1988) 18

Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000) 11

Beckley v. State, 827 S.W.2d 74 (Tex. App. – Fort Worth 1992, no pet.) 23

Bell v. Javis, 236 F.3d 149 (4th Cir. 2000) 11

Berger v. United States, 255 U.S. 22 (1921) 12

Bracy v. Gramley, 520 U.S. 899 (1997) 2, 12, 14

Brecht v. Abrahamson, 507 U.S. 619 (1993) 13

Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001) 24

California v. Green, 399 U.S. 149 (1970) 19

California v. Trombetta, 467 U.S. 479 (1984) 19

Chapman v. California, 386 U.S. 18 (1967) 13

Delaware v. Fensterer, 474 U.S. 15 (1985) 19

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 18, 25

Donnelly v. DeChristoforo, 476 U.S. 637 (1974) 20, 21

Dyas v. Poole, 317 F.3d 934 (9th Cir. 2003) 13

Estelle v. McGuire, 502 U.S. 62 (1991) 23

Fortini v. Murphy, 257 F.3d 39 (1st Cir. 2001) 12

Goldberg v. Kelly, 397 U.S. 254 (1970) 18

Goldberg v. U.S., 425 U.S. 94 (1976) 19

TABLE OF AUTHORITIES – Continued

Page

Hameen v. Delaware, 212 F.3d 226 (3th Cir. 2000) 12

Huddlleston v. U.S., 485 U.S. 689 (1988).....23

Idaho v. Wright, 497 U.S. 805 (1990) 22

Jackson v. Johnson, 194 F.3d 641 (5th Cir. 1999) 24

Jencks v. U.S., 353 U.S. 657 (1957).....18

Kincade v. Sparkman, 175 F.3d 444 (6th Cir. 1994).....25

Liteky v. United States, 510 U.S. 540 (1994).....12, 15, 16

Long v. State, 800 S.W.2d 545 (Tex. Crim. App. 1990).....22

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).....12

Miller v. Anderson, 255 F.3d 455 (7th Cir. 2001).....24

Miller-El v. Cockrell, ___ U.S. ___, 123 S.Ct. 1029 (2003).....12, 17, 26

Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1991) 23

Olesen v. Class, 164 F.3d 1096 (8th Cir. 1999).....13

Packer v. Hill, 253 F.3d 1349 (11th Cir. 2001).....12

Robinson v. Crist, 278 F.3d 862 (8th Cir. 2002).....12

Rose v. Clark, 478 U.S. 570 (1986) 12, 16

Sellan v. Kuhl, 261 F.3d 303 (2nd Cir. 2001).....11

Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998).....20

State v. Michaels, 642 A.2d 1372 (N.J. 1994).....22

Strickland v. Washington, 466 U.S. 656 (1984) 21

Tumey v. Ohio, 273 U.S. 510 (1927) 12, 14, 16

TABLE OF AUTHORITIES – Continued

Page

Ungar v. Sarafite, 376 U.S. 575 (1964) 2, 12, 14, 16

U.S. v. Bess, 593 F.2d 749 (6th Cir. 1979) 20

U.S. v. Garza, 608 F.2d 659 (5th Cir. 1979) 20

U.S. v. Krebs, 788 F.2d 1166 (6th Cir. 1986) 24

United States v. Cronic, 466 U.S. 648 (1984) 21, 24

United States v. Grinnell Corp., 384 U.S. 563 (1966) 12

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 12

CONSTITUTIONS:

Sixth Amendment 3, 17

Fourteenth Amendment ..... *passim*

STATUTES:

28 U.S.C. § 2253(c) 17, 26

28 U.S.C. § 2254 17

STATE STATUTES:

Article 38.072, Texas Code of Criminal Procedure (Vernon 2002) 22

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerry Keith respectfully petitions this Court for a writ of certiorari to review the United States Fifth Circuit Court of Appeals' denial of a Certificate of Appealability and denial of habeas relief on important issues impacting every defendant in a criminal case.

OPINIONS BELOW

1. The denial, without written order, by the Texas Court of Criminal Appeals, of the state writ of habeas corpus. Appendix F.

2. The Report and Recommendation of the United States Magistrate Judge for the Northern District of Texas. Appendix E.

3. The United States District Court for the Northern District of Texas' Order Overruling Objections, Adopting Report and Recommendation, and Denying Petition for Writ of Habeas Corpus. Appendix C.

4. The Judgment of the United States District Court for the Northern District of Texas, denying relief on the writ of habeas corpus. Appendix D.

5. The Order of the United States Court of Appeals for the Fifth Circuit granting a COA on the question of whether the trial judge was biased and denying all other grounds. Appendix B.

6. The unpublished Judgment of the United States Court of Appeals for the Fifth Circuit affirming the United States District Court. Appendix A.

7. The Orders of the United States Court of Appeals for the Fifth Circuit denying a Motion for Rehearing and a Petition for Rehearing En Banc. Appendix G.

JURISDICTION

This Court has jurisdiction over this Petition because the Fifth Circuit Court of Appeals did not interpret a judge's prejudgment of guilt as constitutionally disqualifying under *Ungar v. Sarafite*,[1] or as a denial of due process under *Bracy v. Gramley*,[2] or as a structural error under *Arizona v. Fulminante*,[3] but as subject to a harmless-error analysis and requiring a showing of prejudice. This Court also has jurisdiction to decide the proper standard of review under AEDPA when no state court has written an opinion that can be "looked through to" to determine the reasoning and logic used to deny a state writ of habeas corpus. Lastly, this Court has jurisdiction over this petition because the Fifth Circuit Court of Appeals improperly applied this Court's precedent to deny a Certificate of Appealability on the questions of ineffective assistance of counsel, prosecutorial misconduct and the confrontation of witnesses.

[1] 376 U.S. 575 (1964).

[2] 520 U.S. 899 (1997).

[3] 499 U.S. 279 (1991).

CONSTITUTIONAL AMENDMENTS INVOLVED

I. U.S. CONSTITUTION, amend. 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

II. U.S. CONSTITUTION, amend. 14, section 1.

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioner is a prisoner in state custody. Petitioner filed a writ of habeas corpus in state court that addressed constitutional issues that were not raised or discussed on direct appeal. No findings of fact or conclusions of law were entered by the state courts and the Texas Court of

Criminal Appeal denied the writ without written order. Petitioner timely filed his federal writ of habeas corpus to address the constitutional issues that render his custody illegal.

II. Procedural Background

Petitioner was indicted in the 69th Judicial District Court of Moore County, Texas in Cause No. 2631 for Aggravated Sexual Assault of a Child. Petitioner pled not guilty. The jury convicted Petitioner and sentenced him to 65 years confinement in the Texas Department of Criminal Justice.

The Amarillo Court of Appeals affirmed and the Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review without comment on December 18, 1997. Nothing in these direct appeals addressed the constitutional issues that were raised in the petition for writ of habeas corpus.

On November 3, 1998, Petitioner filed an Application for Writ of Habeas Corpus in the 69th Judicial District Court in Moore County, Texas. On December 8, 1998, without findings of fact or conclusions of law, the Application was forwarded to the Court of Criminal Appeals. On February 10, 1999, the Court of Criminal Appeals denied the Application for Writ of Habeas Corpus without written order. Appendix F.

On March 15, 1999, Petitioner filed his Petition for Writ of Habeas Corpus in the United States District Court. CR at 1. On August 15, 2001, the United States Magistrate recommended that Petitioner be denied relief. Appendix E. On September 20, 2001, the District Court

overruled Petitioner's Objections, denied the Writ of Habeas Corpus and entered judgment accordingly. Appendix C and D.

Denied a Certificate of Appealability by the District Court, Petitioner requested a COA from the Fifth Circuit. On May 8, 2002, the Fifth Circuit granted a COA on the issue of judicial bias and denied it on all other grounds. Appendix B.

On January 15, 2003, the Fifth Circuit affirmed the District Court's denial of the writ of habeas corpus. Appendix A. Petitioner's Petition for Rehearing and Petition for Rehearing En Banc were denied on February 10, 2003. Appendix G.

III. Facts

On June 16, 1994, Brittany Womack "outcried" to her mother. After questioning Brittany, her mother took Brittany to Dumas, Texas, for an appointment with CPS caseworkers. 5 SF 393-394. The interview was not videotaped. The failure to videotape was either the result of orders from the District Attorney or orders from CPS supervisors. 5 SF 394-395. The caseworker also destroyed her contemporaneous notes after preparing a "narrative-style" report. 5 SF 387-92.

The next day, the other two girls mentioned in the "outcry" were interviewed by a CPS caseworker, who suggested that something occurred between them and Petitioner. These interviews were not recorded and the contemporaneous notes were also discarded and typed up in "narrative style". But the answers were "not verbatim". 5 SF 388.

Petitioner was then charged by indictment in Cause No. 2591, which alleged in three separate counts that Petitioner had committed sexual assaults on the children on May 15, 1994. This indictment was dismissed and Petitioner was indicted under Cause Nos. 2624 and 2631. Cause No. 2624 alleged events in May, 1994. Cause No. 2631 alleged events on or about June 1, 1991. Petitioner was represented by the same lawyer in all indictments.

In early April, 1995, a jury convicted Petitioner in Cause No. 2624 of events that were alleged to have occurred in 1994, and awarded probation. After the jury was discharged, the trial judge spoke to those jurors and told them

> "That we, the jury did what we had to do, the state had a weak case with very little to go on. That there were several facts that could not be brought up in this trial. That these facts would be brought up in a second trial in which the state/prosecution had a much stronger case. That Petitioner would be convicted in the next trial and go to prison".

Affidavits of Jurors, Appendix I.

The judge made these statements more than one month before the first proceeding was had in the "second trial" – before any proceeding in which the judge could have learned the facts of the "second trial".

Cause No. 2631 is the four-count indictment which gives rise to this case. It originally charged Petitioner with penetrating the mouths of Crystal Casados, Ashley Mason and Brittany Womack with his penis on or about June 1, 1991, and with touching Brittany's breast with his hand on the same date. State Clerk's Transcript Cause No. 2631, p. 2. Casados completely recanted before trial and the count involving her was dismissed with prejudice. And

the State dismissed the count charging Petitioner with touching Womack's breast. Clerk's Transcript Cause No. 2631, pp. 2, 30.

Defense counsel never requested a hearing under Article 38.072, Code of Criminal Procedure, to determine the reliability or admissibility of the alleged outcry, or even what portion of the mother's 7-page affidavit constituted the outcry under the statute.

Cause No. 2631 came to trial the first time on June 29, 1995. Petitioner received a directed verdict of acquittal concerning Ashley Mason, after which the case ended in a mistrial. SF June 27, 1995, pp. 150-152. On July 31, 1995, the one remaining count was tried again and Petitioner went to trial for having allegedly penetrated Brittany's mouth with his penis.

In opening statements, the prosecutor referred to extraneous acts "involving three girls," without any objection from defense counsel. 4 SF 267. The prosecutor then built an impression that after Womack left Petitioner's house, the sexual conduct continued, again without objection or request for limiting instruction. *Id.*

The State called Sonya Womack to testify. 4 SF 289, 290. Sonya testified beyond Brittany's initial outcry statement. Defense counsel objected once to Sonya's hearsay testimony. 4 SF 289. After the objection was overruled (4 SF 290), defense counsel never objected to Sonya's testimony again. Sonya was unrestrained in testifying to matters that were impermissible hearsay, far beyond the scope of the Article 38.072, outcry. 4 SF 292-93; 296. Defense counsel did not object or request a limiting instruction to any of this testimony. *Id.* Then, on cross-examination, defense counsel elicited answers about Crystal's alleged actions. 4 SF 309.

The State called Ashley Mason. After a brief discussion concerning Ashley's competence, defense counsel stipulated to her competence. 4 SF 326. Then the prosecutor asked – without objection or request for limiting instruction – questions of uncharged acts that allegedly took place between Petitioner, Crystal and Ashley. 4 SF 334. This, even though Petitioner had already received a directed verdict of acquittal as to Ashley – a fact never made known to the jury.

The amount of hearsay or testimony referring to Crystal Casados was overwhelming! *See* 4 SF 352, 354, 357, 365, 371, 372; 5 SF 389, 390, 391, 411, 432, 518, 523, 524, 526; 6 SF 570, 571, 572, 573. Not only were the hearsay / uncharged acts concerning Crystal similar to the single count Petitioner was on trial for, the State went beyond that with the allegation that "Crystal had her britches off and got up and sat on him". 4 SF 296. Counsel did not object or actually elicited the damaging testimony himself. *Id.* On direct, Ashley Mason described the same events she described in Cause No. 2624, even though the two events were supposed to have happened 3 years apart! (June 1, 1991 vs. May 15, 1994)

On cross-examination, defense counsel helped the State convict Petitioner by asking Ashley whether they touched his penis – "We did". (4 SF 335); what happened after you touched his penis – "He touched our vaginas". (4 SF 335-336); "he asked us to touch his penis again". 4 SF 337.

Brittany Womack – the alleged victim – testified about acts between Petitioner and Crystal – acts that Crystal had recanted. Defense counsel initially objected as hearsay concerning what Crystal may have said (4 SF

350); however, defense counsel did not object later concerning what Crystal allegedly did, or on the basis of extraneous offenses, or even request a limiting instruction. 4 SF 351-354.

Defense counsel called the CPS investigator as a witness. 5 SF 376. Defense counsel attempted to demonstrate that her interviewing techniques were overly-suggestive; that she intentionally destroyed her contemporaneous notes (5 SF 388) and that certain answers were only implied. 5 SF 421. However, defense counsel asked questions concerning events between Petitioner, Ashley and Crystal (4 SF 390), and then proceeded to read the caseworker's narrative-styled report in front of the jury: "when she [Brittany] came out of the bathroom, Crystal and Ashley were putting their mouths on Jerry's penis". 5 SF 390, 391; "that Jerry rubbed all three girls tee-tees". 5 SF 391; "she touched his balls with the towel". 5 SF 390-392, 422.

In closing, the State argued about acts concerning "all three girls". 5 SF 518. The prosecutor personally vouched for Brittany's veracity – without objection. 5 SF 519. Defense counsel's closing argument convicted Petitioner when he told the jury, "[W]hen she came out of the bathroom, Crystal and Ashley were putting their mouth on Jerry's balls". 5 SF 523. This, even though those allegations were previously litigated in Petitioner's favor, either through recantation and dismissal, dismissal with prejudice or through a directed verdict of acquittal.

On rebuttal, the prosecutor resorted to giving assurances concerning the State's case by suggesting that the case would not have come to trial if the judge did not think the allegations were valid, or that the judge was not stupid

enough to permit the case to come to trial if there was no evidence to support the charges. 5 SF 534-535. These improper statements were objected to and an instruction was given (5 SF 534) but no request for a mistrial was made.

In the punishment phase of the case, during the State's rebuttal, the prosecutor asked for punishment on allegations that Petitioner was not charged for: "A four-year old child . . . Crystal Casados was about six years old . . . Brittany Womack was seven. A four-year-old, a six-year-old and a seven-year-old . . . He gets them in the house, he fondles them, he has them commit oral sex on him . . . he didn't care about any of those three little girls. . . . I want you to send a message out of this courtroom that in Moore County, Texas, we're going to take care of four-year-olds and six-year-olds and seven-year-olds and we're going to stop this". 6 SF 571-573. Defense counsel did not object or even request a limiting instruction. *Id.*

Petitioner filed his state writ with the trial court and the state filed a response. No findings of fact or conclusions of law were made and the court clerk sent the writ to the Texas Court of Criminal Appeals – without the portion of the writ dealing with judicial bias. The Court of Criminal Appeals did not notice this omission and denied the writ without written order. *See* Appendix E.

REASONS FOR REVIEW

Reason 1: The Circuit Courts of Appeals disagree as to what constitutes "adjudicated on the merits" and whether the pre-AEDPA standard applies if the state court is silent on its logic and reasoning in the adjudication of the constitutional claims.

Petitioner's state writ of habeas corpus raised federal constitutional questions relating to the illegality of his confinement. These issues were not raised in his direct appeal; therefore the orders in his direct appeal may not be looked at to determine the state courts' logic and reasoning in dealing with these issues.

There are no findings of fact or conclusions of law from the state trial court relating to the denial of the state writ. Even though the portion of the writ dealing with judicial bias was omitted by the clerk in the transmittal to it, the Texas Court of Criminal Appeals denied the writ "without written order". Appendix F.

The Fifth Circuit, applying a decision from the Texas Court of Criminal Appeals, holds that such an order is a "decision on the merits" and the AEDPA standard of review applies. *Barrientes v. Johnson*.[4] This position agrees with the Second and Fourth Circuits.[5] The Fifth Circuit also held that the "state-court adjudication denying Keith's habeas corpus was neither contrary to clearly established federal law as determined by the Supreme

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[4] 221 F.3d 741, 778-89 (5th Cir. 2000).

[5] *Sellan v. Kuhl*, 261 F.3d 303 (2nd Cir. 2001); *Bell v. Javis*, 236 F.3d 149 (4th Cir. 2000).

Court nor based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings". This holding directly conflicts with the opinions of this Court.[6]

And the First, Third, Eighth, Ninth, Tenth and Eleventh Circuits disagree with the Fifth Circuit's position, holding that if the state court is silent, then the constitutional claim has not been adjudicated on the merits and the pre-AEDPA standard applies.[7]

In *Ylst v. Nunnemaker*,[8] this Court held that when the record is silent concerning a constitutional claim, the court must "look through" to the last reasoned state court judgment on the issue. But when the state makes no findings and there is nothing that can be "looked through to," a habeas applicant in federal court is denied the opportunity to rebut the state-court factual determinations by clear and convincing evidence. This severely impacts habeas applicants' Due Process rights. This Court should therefore resolve this conflict in the Circuits and address the procedural loophole in the federal habeas

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[6] *See, Bracy v. Gramley*, 520 U.S. 899 (1997); *Liteky v. United States*, 510 U.S. 540 (1994); *Rose v. Clark*, 478 U.S. 570 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Tumey v. Ohio*, 273 U.S. 510 (1927); and *Berger v. United States*, 255 U.S. 22 (1921).

[7] *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001); *Hameen v. Delaware*, 212 F.3d 226, 248 (3rd Cir. 2000); *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002); *Packer v. Hill*, 253 F.3d 1349, 1362 (11th Cir. 2001).

[8] 501 U.S. 797, 803 (1991). *See also, Miller-El v. Cockrell*, ___ U.S. ___, 123 S.Ct. 1029 (2003).

procedure that is created when the state-court-of-last-resort denies a writ "without written order".

Reason 2: If a state court does not adjudicate a constitutional claim on the merits, or apply a harmful-error analysis, which controls – *Chapman's*[9] beyond a reasonable doubt or *Brecht's*[10] substantial and injurious effect?

The Eighth and Ninth Circuits hold that when a constitutional claim has not been adjudicated on the merits, then the *Chapman* standard still applies.[11] But the District Court applied the *Brecht* standard in denying the writ (Appendix E); and the Fifth Circuit used that standard in denying the motion for a COA. Appendix B. Since constitutional is equated with habeas corpus relief and *Chapman* does not explain which proceedings its standard is to be used in, this Court should resolve this conflict among the Circuits.

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[9] *Chapman v. California*, 386 U.S. 18 (1967).

[10] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[11] *Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999); *Dyas v. Poole*, 317 F.3d 934 (9th Cir. 2003).

Reason 3: The Fifth Circuit's holding that the trial judge's extra-judicial exposure to the facts of a second case and his prejudgment of Petitioner's guilt in the second case was not constitutionally disqualifying and subject to a "harmless-error" analysis, conflicts with prior decisions of this Court.

Reason 4: The Fifth Circuit's decision that judicial bias in a criminal case is analyzed by whether there was an appearance of impropriety that rose to the level of a fundamental defect resulting in a complete miscarriage of justice conflicts with prior decisions of this Court that constitutionally disqualify a judge who prejudges guilt.

This is a case that arises directly under the Due Process Clause of the Fourteenth Amendment.[12] And in the context of judicial bias, this Court set the parameters as to what is constitutionally disqualifying conduct, when it held that a prejudgment of guilt is constitutionally disqualifying.[13] This Court has yet to address the sufficiency of the evidence required to establish that prejudgment of guilt.

There had been no proceedings in Cause No. 2631 by which Judge Enns could have learned the facts associated with the indictment in that case when he spoke to the

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[12] *Bracy v. Gramley*, 520 U.S. 899 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Tumey v. Ohio*, 273 U.S. 510 (1927).

[13] *Ungar v. Sarafite*, 376 U.S. 575, 587-88 (1964). *See also, Bracy v. Gramly, supra.*

jurors in Cause No. 2624. Judge Enns' comments were not a expression of an opinion formed during the trial of Cause No. 2624. They were statements about a case of which Judge Enns should have had no knowledge of the facts or the strength of the State's case. The factual allegations involved totally different events that allegedly occurred in 1991 – not 1994 as in Cause No. 2624. Petitioner was not even arraigned until May 8, 1995 – more than a month later; and Cause No. 2631 was not even tried until almost three months later, on June 27, 1995. Docket Sheet in Cause No. 2631, State Court Records, Vol. 1, pp. 15-17.

The affidavits of the jurors in Cause No. 2624 affirmatively show that Judge Enns had been extra-judicially exposed to the facts in Cause No. 2631, had determined the strength of the State's case and had pre-judged Petitioner's guilt in that case. Appendix I. Since there had been no proceedings in the second case on April 6, 1995, when the judge made his statements to the jurors in the first case, the source of his information *must* be extrajudicial and constitutionally disqualify the judge as they are *not* merely the result of his exposure to the merits of Cause No. 2631.[14]

The Fifth Circuit, in denying the writ of habeas corpus, required Petitioner to show where the jurors in Cause No. 2631 had heard the comments, or how Judge Enns' bias was demonstrated on the record or affected the jury – concluding that without such a showing, Petitioner had not demonstrated harm. Appendix A, at A2.

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[14] *Liteky v. United States*, 510 U.S. 540 (1994).

But the question is not whether the trial judge's bias was evident, or whether the jury who convicted Petitioner heard the conversation or was improperly influenced by the judge. Under this Court's decisions, the proper questions are: (i) was the trial judge biased; (ii) had he prejudged Petitioner's guilt; or (iii) had he formed an opinion that derived from an extrajudicial source; and, if so, (iv) do they reveal such a high degree of antagonism as to make fair judgment impossible?[15]

And being required to show harm conflicts with *Rose v. Clark*,[16] where this Court held that the trial judge's bias against Petitioner is not subject to a harmless-error review. If the trial judge was biased, or if he had prejudged Petitioner's guilt, then this is a constitutional violation that is not subject to the "harmless-error" analysis but is instead a structural defect "affecting the framework within which the trial proceeds".[17] This is so, because "the impact of the error on the jury's performance of its duties cannot be reviewed".[18] In the context of a harmless-error analysis, therefore, the first analysis herein is whether the judge was impartial. If the judge was not impartial, then no harmless-error can be engaged in, for this is a structural error that requires reversal of the denial of the writ of habeas corpus.

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[15] *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ungar v. Sarafite*, 376 U.S. 575, 587-88 (1964); *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[16] 478 U.S. 570, 577-78 (1986).

[17] *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

[18] *Ibid. See also, Rose v. Clark*, 478 U.S. at 577-78.

Reason 5: Petitioner should have been granted a COA because he made a substantial showing of a denial of constitutional rights.

Under AEDPA, before an appeal from the dismissal or denial of a § 2254 petition can proceed, a petitioner must first obtain a COA, which will "Issue only if the applicant has made a substantial showing of the denial of a constitutional right". 28 U.S.C. § 2253(c). This Court looks to the District Court's application of AEDPA to Petitioner's constitutional claims and asks whether that resolution was debatable among jurists of reason.[19]

Petitioner's constitutional claims were: (i) the denial of an impartial judge – addressed above, (ii) denial of effective assistance of counsel, (iii) improper conduct by the prosecutor and (iv) infringement of his confrontation rights under the Sixth Amendment.

Confrontation Rights

To avoid being stuck with a bad interview and acting on instructions of the District Attorney, the CPS caseworker did not videotape the interviews of the children. The original interview notes were reduced to a "narrative-style" report and then destroyed. The narrative did not contain verbatim answers. The caseworker's narrative-style report was introduced as substantive evidence against Petitioner.

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[19] *Miller-El v. Cockrell*, ___ U.S. ___, 123 S.Ct. 1029, 1039 (2003).

The caseworker deliberately failed to videotape the interviews. Therefore the only tangible evidence on which the caseworker could be cross-examined was the original interview notes. But that evidence was destroyed. The Fifth Circuit and the District Court concluded Petitioner was able to question the caseworker regarding the circumstances of the interview and the context of the narrative-style report, and that there were no limitations on the scope of cross-examination of the two children.

That analysis is incorrect. A defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby show the jury facts that allow them to draw inferences about the witness' reliability.[20] And the bad-faith failure to preserve potentially useful evidence constitutes a due process violation.[21]

The narrative-style reports given to Petitioner are only the investigator's interpolation of the witness' statements, re-written into a narrative style and never read back to the witness to ascertain agreement. This creates the danger of the second-hand presentation of facts by a witness who usually gathers facts for the charge – an intolerable situation.[22] It also deprives a defendant of the use of the witness' actual statements.[23] Therefore, what

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[20] *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

[21] *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Unanswered is the question what happens when the State creates the evidence – the interview – and deliberately fails to preserve same.

[22] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

[23] *Jencks v. U.S.*, 353 U.S. 657 (1957).

was produced to Petitioner cannot be "fairly said to be the witness' own statements" but were only the result of the investigator's selections, interpretations and interpolations.[24] Further, the original notes possessed an exculpatory value that was apparent before their destruction and Petitioner had no other way of obtaining comparable evidence.[25]

In addition to stating a due process violation of Petitioner's right to the confrontation of witnesses, the failure to videotape and the destruction of the original notes also raise the question of substituting timely cross-examination for subsequent cross-examination – a question that this Court has left unanswered.[26]

Prosecutorial Misconduct

The prosecutor engaged in argument that denied Petitioner a fair trial, he personally vouched for the complainant's veracity, he requested convictions for crimes that Petitioner was not on trial for, and he argued for multiple punishments on a single act.

Twice, the prosecutor told the jury that the judge would not submit a case to them if there was no evidence. 5 SF 534-535. This was an improper suggestion that Petitioner was guilty merely because he was being prosecuted or had been indicted and injected the authority of

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[24] *Goldberg v. U.S.*, 425 U.S. 94, 106-108 (1976).

[25] *California v. Trombetta*, 467 U.S. 479, 480 (1984).

[26] *California v. Green*, 399 U.S. 149 (1970); *Delaware v. Fensterer*, 474 U.S. 15 (1985).

the court into the argument of guilt.[27] And it was so prejudicial that the limited instruction to disregard could not get the skunk stink out of the jury box.[28]

The prosecutor improperly vouched for the complainant's credibility – without objection. This invaded the province of the jury to judge credibility of the witness.[29]

The prosecutor asked for a conviction for what happened to all three girls. 5 SF 518. But Petitioner had already received a directed verdict of acquittal, a dismissal and a dismissal with prejudice on what allegedly happened to the other two girls. This argument was improper and violated Petitioner's due process rights by indirectly subjecting him to a double jeopardy violation – conviction for acts for which he had already been acquitted.[30]

During punishment, the prosecutor asked for punishment for what happened to all three girls. 6 SF 571-73. There was no objection even though Petitioner had already been acquitted or the charges had been dismissed with prejudice.

There are some occurrences at trial that are too prejudicial for a curative instruction to mitigate their effect.[31] Individually or cumulatively, these arguments

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[27] *U.S. v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979) and cases cited therein.

[28] *U.S. v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979).

[29] *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

[30] This is not a technical double jeopardy violation since there was no new indictment. It should be held to be the functional equivalent of one.

[31] *Donnelly v. DeChristoforo*, 476 U.S. 637, 646 (1974).

violated Petitioner's substantive due process rights and deprived him of a fair trial under *Donnelly v. DeChristoforo.*[32]

Ineffective Assistance of Counsel

This Court set the standard for gauging the effectiveness of counsel in *Strickland v. Washington.*[33] The test for ineffective counsel has two prongs. First, the trial counsel's performance must have been deficient and fallen below an objective standard of reasonableness. To meet this prong, the defendant must first identify the acts or omissions of counsel that are alleged to fall outside the scope of reasonable professional judgment. Secondly, counsel's performance must have prejudiced the result. The burden rests with the defendant to show a reasonable probability exists of a different result but for counsel's unprofessional errors. A reasonable probability is "a probability sufficient to undermine confidence in the outcome".[34] The effectiveness of counsel is ordinarily gauged by the totality of the representation, but a single error, if sufficiently egregious, can constitute ineffective assistance of counsel.[35]

Defense counsel's errors and omissions were staggering in their frequency and in the severity of their impact on the trial. They began when counsel failed to challenge the competence of the complainant and then stipulated to

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[32] *Ibid.*

[33] 466 U.S. 656 (1984).

[34] *Strickland* at p. 694.

[35] *United States v. Cronic*, 466 U.S. 648 (1984).

her competence even though the CPS caseworker subjected the complainant to improper interviewing techniques. During trial the complainant recounted events from 1991 in a way that was indistinguishable from what she testified – in Cause No. 2624 – as having happened in 1994. This Court acknowledged that improper interviews of children can result in the creation of false memories.[36] And the short interview by the trial court that the District Court referred to in denying this point, should not be held to comprise an adequate challenge to the child's competence – especially not in light of the judge's prejudgment of Petitioner's guilt and counsel's stipulation to her competence, *supra.*

Then counsel failed to request a determination of the reliability of the "outcry" statement as allowed by Article 38.072, Texas Code of Criminal Procedure. If a request had been made, a hearing was mandatory.[37] The District Court denied this point, holding that Petitioner could not show that the statement would not have been admitted even if counsel had requested the hearing. This holding was incorrect for two reasons: First, it would have preserved the issue for appeal. Second, at the very least, it would have resulted in the exclusion of those portions of the "outcry statement" relating to what was allegedly done to the other two girls – because the statute is an exception to

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[36] *Idaho v. Wright*, 497 U.S. 805 (1990). *See also, State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

[37] *Long v. State*, 800 S.W.2d 545 (Tex. Crim. App. 1990).

the rule against hearsay and is strictly limited to what happened to the child making the outcry.[38]

Counsel then failed to object to the destruction of the original notes or to the failure to videotape the interviews – waiving these issues for appeal.

Then counsel repeatedly failed to object to evidence about extraneous, uncharged offenses allegedly committed against the other two girls. Counsel did not request a limiting instruction – even though Petitioner had been acquitted on one of the acts, one indictment had been dismissed and the indictment relating to Crystal Casados had been dismissed with prejudice due to her complete recantation. Even if the District Court was correct in holding that these were not extraneous offenses, Petitioner had an absolute right to a limiting instruction if it had been requested.[39]

Counsel then compounded the error by asking questions that elicited answers that were extraneous offenses – offenses for which Petitioner had been acquitted! *See, e.g.*, 4 SF 335-337. In short, counsel helped to convict Petitioner.

Counsel then abrogated his responsibilities entirely when he did not object to any of the prosecutor's misdeeds during closing argument, both on guilt – innocence and on

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[38] *Beckley v. State*, 827 S.W.2d 74, 78-79 (Tex. App. – Fort Worth 1992, no pet.).

[39] *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1991); *Abnor v. State*, 871 S.W.2d 726 (Tex. Crim. App. 1994); *Huddleston v. U.S.*, 485 U.S. 689 (1988). *See also, Estelle v. McGuire*, 502 U.S. 62 (1991).

punishment.[40] And he put himself into a direct conflict of interest with Petitioner when, during his closing argument, he stated as an affirmative fact that "[W]hen she came out of the bathroom, Crystal and Ashley were putting their mouth on Jerry's balls". 5 SF 523. Counsel was then helping to convict Petitioner with acts for which Petitioner had been acquitted.[41] This one act was sufficiently egregious to constitute ineffective assistance of counsel.[42]

Debatable Among Jurists of Reason

The Fifth Circuit affirmed the denial of Petitioner's writ by holding that the "state-court denial of Keith's habeas corpus application was neither contrary to clearly established law as determined by the Supreme Court nor based on any unreasonable determination of facts in light of the evidence presented in the state court proceedings". Appendix A and B.

The facts and authority set forth above demonstrate that this conclusion is incorrect, that the issues are debatable among jurists of reason and Petitioner should have been granted a COA on all issues.

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[40] *Jackson v. Johnson*, 194 F.3d 641 (5th Cir. 1999); *U.S. v. Krebs*, 788 F.2d 1166, 1176 (6th Cir. 1986).

[41] *See, e.g., Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (Counsel's closing argument stating defendant's "wife would lie for him" is not sound tactic when the statement demolished defendant's alibi defense, relief granted); *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001) (Deficient performance for not objecting to improper closing arguments and asking for cautionary instruction).

[42] *Cronic, supra.*

Reason 6: The Fifth Circuit applied the wrong standard in denying Petitioner's request for a COA and in denying the writ of habeas corpus on the issue of judicial bias.

The COA was denied because "Keith failed to show the limitation (on cross-examination) had a substantial and injurious effect on the jury's verdict". Appendix B. That analysis applied the harmless-error standard concerning the denial of the right to meaningful confrontation to the outcome of the entire trial, instead of to the injurious effect on the particular witness, contrary to this Court's holding in *Delaware v. Van Arsdall, supra.* The Circuit Court's denial of the claim relating to the prosecutor's request that Petitioner be convicted for criminal allegations on which Petitioner was acquitted conflicted with the holding of the Sixth Circuit in *Kincade v. Sparkman*,[43] and is therefore debatable among jurists of reason.

The Fifth Circuit, in affirming the District Court, limited Petitioner's confrontation rights by ignoring the intentional destruction of the original interview notes and the deleterious effect that had on Petitioner's due process and Confrontation Clause rights.

Petitioner's ineffective assistance of counsel claim is a mixed question of fact and law. Petitioner was denied the opportunity to present expert testimony on the standard of care for defense counsel in this case. The claim was not adjudicated in state court in such a way that this Court can find a written opinion detailing the logic or authority used in the denial of the claim. The Fifth Circuit's denial

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[43] 175 F.3d 444 (6th Cir. 1994).

of the COA, without briefing, was a premature judgment on the merits in violation of the dictates of *Miller-El v. Cockrell, supra.* And, Petitioner presents controlling case law that is materially indistinguishable from Petitioner's claim; therefore Petitioner's ineffective assistance of counsel claim is a substantial showing of a denial of a constitutional right and satisfies the "debatability" or "wrong" clauses of 28 U.S.C. § 2253(c).

Lastly, in denying Petitioner's COA, the courts below held Petitioner to the ultimate resolution of the constitutional debate that was presented, requiring him to show that the appeal would succeed. They did not focus on the debatability of the constitutional issues presented. In so doing, the Fifth Circuit denied Petitioner the opportunity to fully brief and explore the constitutional issues, thereby violating this Court's decision in *Miller-El v. Cockrell, supra.*

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and hear this case on the merits. Petitioner has shown substantial violations of his constitutional rights – violations that render his incarceration illegal and that warrant habeas relief. The conflicts between the Circuit Courts should be resolved to promote uniformity of decision. This Court should grant Petitioner all relief to which he is entitled.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-11252
Summary Calendar

JERRY BRYAN KEITH,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:99-CV-107

(Filed Jan. 15, 2003)

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:*

Jerry Bryan Keith (Keith), now a Texas state prisoner, appeals the denial of his 28 U.S.C. § 2254 petition. A

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

certificate of appealability was granted on the issue of whether the trial jduge was biased.

Keith was indicted in two causes and charged with multiple counts of sexual misconduct involving juveniles. The causes were tried separately. After the verdict was rendered in the first trial, the trial judge had a conversation with jurors. Keith contends that this conversation indicates that the trial judge was improperly biased. Thus, Keith argues, when the same trial judge presided over subsequent trials on the second cause, which resulted in a jury conviction and sentence, he was deprived of his constitutional right to a fair trial before an impartial tribunal. Keith makes no allegation that the jury who convicted him in his subsequent trial either heard the conversation or was improperly influenced by the trial judge.

Keith initially argues that his application for writ of habeas corpus filed in Texas state court was denied without an adjudication of the merits and thus the deferential standard of review set forth in 28 U.S.C. § 2254(d) is not applicable to his appeal. The term "adjudication on the merits" in 28 U.S.C. § 2254(d) addresses whether the state court's disposition of the claim at issue was procedural or substantive. *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002) (*en banc*). Nothing in the case history suggests that the Texas Court of Criminal Appeals was aware of a procedural bar to considering Keith's claims. *See Barrientes v. Johnson*, 221 F.3d 741, 778-80 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001) (setting forth analysis to determine whether state court adjudication was merits-based). Additionally, the Texas Court of Criminal Appeals' language, "denied without written order," indicates that the denial was on the merits. *Id.* at 779-80;

Miller v. Johnson, 200 F.3d 274, 281 (5th Cir.) *cert. denied*, 531 U.S. 849 (2000). Therefore, the deferential standard set forth in 28 U.S.C. § 2254(d) is applicable to Keith's case.

Not all questions of judicial qualification involve constitutional validity. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). When analyzing judicial bias in habeas proceedings, the issue is whether there was an appearance of impropriety that rose to the level of a fundamental defect resulting in a complete miscarriage of justice. *United States v. Couch*, 896 F.2d 78, 81-82 and n.6 (5th Cir. 1990). Constitutionally intolerable bias is found only in extreme cases. *Public Citizen Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2002); *see Baran v. Port of Beaumont Navigation*, 57 F.3d 436, 444 (5th Cir. 1995).

Keith's case is not the extreme type of case where there was a probability of bias on the part of the trial judge that was so high that it was constitutionally intolerable. Therefore, the state-court adjudication denying Keith's habeas corpus application was neither contrary to clearly established federal law as determined by the Supreme Court nor based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 411-12 (2000).

The decision of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-11252
USDC No. 2:99-CV-107

JERRY BRYAN KEITH,

Petitioner-Appellant,

versus

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 8, 2002)

ORDER:

Jerry Bryan Keith was convicted by a Texas jury of aggravated sexual assault of a child and sentenced to 65 years of imprisonment. Keith moves this court for a certificate of appealability (COA) to appeal the district court's denial of his application for habeas corpus under 28 U.S.C. § 2254.

Keith asserts that he was deprived of his right to confront the witnesses against him because no videotapes

were made of the interviews of the children testifying against him and the original notes from those interviews were not preserved. Keith called the CPS caseworker and questioned her regarding the circumstances of the interviews and the contents of the narrative reports of those interviews. Keith has failed to show any limitation of the scope of cross-examination of the two children that "substantially and injuriously affected or influenced the verdict." *Shaw v. Collins*, 5 F.3d 128, 132 (5th Cir. 1993). Keith has also not demonstrated that this was a failure to preserve evidence that violated his due process rights. *United States v. Thompson*, 130 F.3d 676, 686 (5th Cir. 1997) (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988). A COA is DENIED as to these issues.

Keith asserts that his counsel was ineffective for failing to request an "outcry" hearing; for failing to object to testimony of extraneous offenses; for failing to challenge two children's competency to testify; for failing to object to failure to preserve evidence; for failing to object to the prosecution's argument; and for failing to present an issue in the petition for discretionary review. Under *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984), Keith must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced his defense. Keith has failed to establish either deficient performance or prejudice with respect to any of these claims of ineffective assistance of counsel. A COA is DENIED as to all of these issues.

Keith asserts that he was denied an impartial tribunal because the state trial judge was biased based on statements made to the jury following trial on a different matter. A defendant is entitled to an impartial tribunal.

Nethery v. Collins, 993 F.2d 1154, 1157 (5th Cir. 1993). "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The issue of the trial judge's bias is debatable among jurists of reason and COA is GRANTED on this issue. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

COA GRANTED ON ISSUE WHETHER THE TRIAL JUDGE WAS BIASED; COA DENIED ON REMAINING ISSUES.

/s/ Robert M. Parker
Robert M. Parker
UNITED STATES
CIRCUIT JUDGE

APPENDIX C

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JERRY BRYAN KEITH, Petitioner, v. GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§ § § § § § § § §	CIVIL ACTION NO. 2:99-CV-107-J

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION, AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed Sep. 20, 2001)

Came this day for consideration the petition for writ of habeas corpus filed by petitioner JERRY BRYAN KEITH. On August 15, 2001, the United States Magistrate Judge issued a Report and Recommendation in this cause, recommending therein that Petitioner's application for a writ of habeas corpus be denied. Petitioner filed objections to the Magistrate Judge's Report and Recommendation on August 27, 2001. Petitioner also filed corrections to the prior-filed objections on September 5, 2001.

The undersigned United States District Judge has made an independent review of the record in this case

and has examined the Report and Recommendation of the Magistrate Judge, as well as the objections and corrections filed by Petitioner. The District Judge is of the opinion that Petitioner's objections should be, and are hereby, OVERRULED.[1] The District Judge is of the further opinion that the Magistrate Judge's Report and Recommendation should be and is hereby ADOPTED.[2] Accordingly, the petition for a writ of habeas corpus filed by Petitioner is DENIED.

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[1] Petitioner raised several new arguments in his objection to the Magistrate Judge's report. These new arguments have not been considered and are overruled. *Kinash v. Callahan*, 129 F.3d 736, 739 n. 10 (5th Cir. 1999).

[2] In section IV.B. paragraph 3, the Magistrate Judge denies Petitioner's argument on the basis that "[u]nder 28 U.S.C. § 2254(d)(1), Keith's argument must fail because he cannot show an unreasonable application of Supreme Court law." Section 2254(d) applies only to issues that have been adjudicated on the merits in state court. In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). Where there is no adjudication on the merits in state court, as in this case, the correct standard of review for federal courts is *de novo* review. *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir.1997); *see also Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

Here the Magistrate Judge's conclusion that Petitioner's argument must fail under section 2254(d) is in error; however, the Magistrate, in fact, conducted a *de novo* review of Petitioner's claim, and his argument is overruled on that basis.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The United States District Clerk is directed to mail a file-market copy of this Order to Petitioner and to each attorney of record by first class mail.

IT IS SO ORDERED.

ENTERED this 19th day of September 2001.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JERRY BRYAN KEITH, Petitioner,	§	
v.	§	CIVIL ACTION NO. 2:99-CV-107-J
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§	

JUDGMENT

(Filed Sep. 20, 2001)

Of equal date herewith, the undersigned United States District Judge has entered an Order adopting the Report and Recommendation issued by the United States Magistrate Judge, and denying Petitioner's application for a writ of habeas corpus.

JUDGMENT IS ENTERED ACCORDINGLY.

IT IS SO ORDERED.

ENTERED this 19th day of September 2001.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

JERRY BRYAN KEITH,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO.
GARY L. JOHNSON,	§	2:99CV-107-J
Director, Texas	§	
Department of	§	
Criminal Justice,	§	
Institutional Division,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION TO DENY PETITION FOR A WRIT OF HABEAS CORPUS

(Filed Aug. 15, 2001)

Petitioner Jerry Bryan Keith ("Keith") has filed with this court a Petition for a Writ of Habeas Corpus by a Person in State Custody challenging his conviction and sentence in Cause Number 2631 for the felony offense of aggravated sexual assault of a child out of the 69th Judicial District Court of Moore County, Texas. The United States District Judge Mary Lou Robinson pursuant to 20 U.S.C. § 636(b), referred this case to the United States Magistrate Judge Clinton E. Averitte for report and recommendation, proposed findings of fact and conclusions of law, and a proposed judgment. Judge Averitte recused himself on May 24, 1999, and the matter was referred to the United States Magistrate Judge Nancy M. Koenig on June 16, 1999. A hearing was held on the petition for writ of habeas corpus on April 19, 2001, in Amarillo, Texas,

where Keith was present, and represented by counsel. For the reasons hereinafter expressed, the Magistrate Judge recommends petitioner's application be **DENIED**.

I. PROCEDURAL HISTORY

Keith was indicted in the 69th Judicial District Court of Moore County, Texas, in Cause Number 2631 for aggravated sexual assault of a child.[1] Keith's first trial in Cause

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[1] Keith was originally charged by indictment in Cause Number 2591, which alleged three separate counts: (1) intentionally and knowingly penetrating the vagina of one child, A.M., with his finger on or about May 15, 1994 (2) engaging in sexual contact with A.M. by manually touching her breast for his own arousal and gratification on May 15, 1994, and (3) exposing a portion of his genitals to A.M. for his own arousal and gratification on May 15, 1994. This cause was dismissed and Keith was reindicted under Cause Numbers 2624 and 2631.

Cause Number 2624 began as a four-count indictment against Keith, charging him with two counts of aggravated sexual assault of a child and two counts of indecency with a child – one involving C.C., and the other involving A.M. The aggravated sexual assault charges stemmed from Keith allegedly penetrating each girl's vagina with his finger, while the indecency charges involved Keith's allegedly touching each girl's breast with his hand. The indictment charged that all four counts occurred on or about May 15, 1994. Both charges involving C.C. were dismissed. The State tried Keith on the two remaining counts of Cause Number 2624 in April of 1995. The jury found Keith guilty on both counts, and sentenced him to ten years confinement and a ten thousand dollar fine on each count. The jury also recommended probation on each count. Judge Enns followed the jury's recommendation.

Cause Number 2631, the subject of this habeas petition, was a four-count indictment, charging Keith with penetrating the mouths of C.C., A.M., and B.W. with his penis on or about June 1, 1991, and with touching B.W.'s breast with his hand on the same date The count involving C.C. was dismissed. The State also dismissed the count charging Keith with manually touching B.W.'s breast. Keith obtained a directed verdict of acquittal on the charge of penetrating A.M.'s mouth

(Continued on following page)

Number 2631 ended in a mistrial on June 28, 1995. The second trial began on August 1, 1995. A jury convicted Keith on one count of aggravated sexual assault. The jury assessed punishment on August 3, 1995, at 65 years' imprisonment in the Texas Department of Criminal Justice, Institutional Division, and a fine of $10,000.00.

Keith appealed his conviction and, on October 30, 1996, the Court of Appeals for the Seventh Supreme Judicial District at Amarillo, Texas, affirmed his conviction. Keith filed a petition for discretionary review with the Texas Court of Criminal Appeals which, on April 16, 1997, refused five of his points of error, and remanded one point of error to the intermediate appellate court for further consideration. The Court of Appeals reconsidered and overruled the remaining point of error on June 11, 1997. The Texas Court of Criminal Appeals denied Keith's petition for discretionary review on December 18, 1997.

Keith filed one state application for writ of habeas corpus on November 3, 1998, which was denied by the Texas Court of Criminal Appeals, without written order.[2]

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with his penis. Keith was convicted on the count alleging that he penetrated B.W.'s mouth with his penis.

(**NOTE**: Due to the sensitive nature of this case and the ages of the minor children, abbreviations rather than their names will be used in this report.)

[2] On November 3, 1998, Keith filed his first Writ of Habeas Corpus in state court. On December 7, 1998, Judge Enns recused himself from this matter. On December 8, 1998, a letter was directed to the 9th Judicial District requesting assignment of a visiting judge to Cause Number 2631. The record does not indicate whether a judge was ever assigned to this case. No hearing was held in state court, no findings or conclusions were filed, and no recommendation was made to the Texas

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On March 15, 1999, Keith filed the instant federal petition for writ of habeas corpus with this court. Keith continues to be confined in the custody of respondent Gary L. Johnson as a result of his conviction and sentence.

II. PETITIONER'S GROUNDS

Keith raises the following grounds for review in his federal petition:

A. He was denied a fair and impartial magistrate;

B. The State's failure to record interviews of child witnesses abridged his right to confrontation and interfered with the effective assistance of counsel;

C. He received ineffective assistance of trial counsel at the guilt/innocence phase of trial because his attorney:

1. failed to request an "outcry" hearing;

2. failed to request a hearing to determine the "taint"/competence of the child witnesses;

3. failed to object to the State's failure to preserve exculpatory evidence;

Court of Criminal Appeals. On February 10, 1999, the Texas Court of Criminal Appeals denied the application without written order.

4. failed to object to testimony regarding extraneous acts and uncharged misconduct;

5. neglected to request a proper charge;

6. failed to object to inadmissable and prejudicial evidence; and

7. failed to object to the State's improper closing arguments;

D. He received ineffective assistance of trial counsel at the punishment phase of trial because his attorney failed to object to the State's closing argument to the Jury during the punishment phase regarding extraneous acts and uncharged misconduct;

E. He received ineffective assistance of appellate counsel because his attorney:

1. failed to present and argue the issue of whether trial counsel "opened the door" to the prosecution's expert on the truthfulness of the complaining witness;

2. failed to argue that the state's improper interviewing techniques permanently tainted the complainant's testimony;

3. failed to raise on appeal the judge's bias;

4. failed to contest the lack of proper jury instructions;

5. failed to raise on appeal the prosecution's improper closing arguments in both phases of the trial; and

6. failed to address the improper vouching for the credibility of the witnesses in the Petition for Discretionary Review.

III. STANDARD OF REVIEW

Keith filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); therefore, the AEDPA standards apply. *See Lindh v. Murphy*, 521 U.S. 320 (1997) (holding that all federal writs filed on or after April 24, 1996, are subject to AEDPA). The AEDPA enacted the present 28 U.S.C. § 2254(d), which provides that a state prisoner may not obtain federal habeas relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the fact in light of the evidence presented in the State court proceeding.

The Supreme Court of the United States has determined that under § 2254(d)(1), a federal court may grant a writ under the "contrary to" clause, "if the state court arrive[d] at a conclusion opposite to that reached by [the

Supreme] Court on a set of materially indistinguishable facts." *Williams v. Taylor*, 520 U.S. 362, 412 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Pure questions of law and mixed questions of law and fact should be reviewed under § 2254(d)(l), while pure questions of fact should be reviewed under § 2254(d)(2). *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000).

To determine whether the state court decision was an "adjudication on the merits," the federal court should consider (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state opinions suggest reliance upon procedural grounds rather than a determination on the merits. *Fisher v. State of Texas*, 169 F.3d 295, 300 (5th Cir. 1999). Although an "adjudication on the merits" requires that a state court afford a petitioner a full and fair hearing on his claims, "[a] full and fair hearing does not necessarily mean a live hearing." *Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996). A paper hearing, that is, a hearing based on affidavits and the record, can serve as a "full and fair hearing" if the factual disputes underlying a petitioner's claim can be resolved without a hearing. *Id.* at 446. When a state court has made findings of fact after a full and fair hearing, a federal court must grant those findings of fact a presumption of correctness and does not relitigate those facts. *Id.* at 445; 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting

the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Texas Court of Criminal Appeals denied Keith's state habeas application without written order on the findings of the trial court without a hearing. "When the Texas Court of Criminal Appeals explicitly adopts the findings of fact and conclusions of law of a trial court, and denies relief, even without a hearing, it qualifies as an "adjudication on the merits." *Hill v. Johnson*, 210 F.3d at 485. Thus, it appears that Keith's claims were adjudicated on the merits. Nevertheless, the court notes that there was no response filed by the State to Keith's State application; there was no State Court hearing; there were no findings of fact or conclusions of law entered by the trial court; there was no written order by the Court of Criminal Appeals; and the record is devoid of any indication as to whether a trial court judge was ever appointed to look at the State application.

Under 28 U.S.C. § 2254, as amended by the AEDPA, a state prisoner may not obtain federal habeas relief until (1) he exhausts the available state court remedies or (2) he demonstrates either the absence of state court remedies or circumstances that render the state court remedies ineffective. 28 U.S.C. § 2254(b)(1). *See Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (holding that a federal habeas petition should be dismissed if state remedies have not been exhausted as to all federal court claims).

"The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Id.* The highest state court in Texas for criminal matters is the Texas Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429,

431-32 (5th Cir. 1985). Thus, a prisoner convicted of a noncapital offense in the State of Texas may exhaust his state court remedies by filing an appeal with the intermediary courts of appeal and a petition for discretionary review with the Texas Court of Criminal Appeals. *Sones v. Hargett*, 61 F.3d 410, 414-15 (5th Cir. 1995). If the prisoner does not file both an appeal and a petition for discretionary review, he must file a state application for a writ of habeas corpus to exhaust his state court remedies in Texas. *Lowe v. Scott*, 48 F.3d 873, 875 (5th Cir. 1995). A habeas petitioner has not exhausted his state court remedies if he has the right to raise the question by any available procedure under state law. *Id.* at 875. *See Nobles v. Scott*, 127 F.3d 409, 420 (5th Cir. 1997) (holding that a state prisoner may not present legal theories or factual claims to the federal court that he has not presented to the state courts). "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent the disruption of state judicial proceedings." *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

After considering Johnson's Motion to Dismiss for Failure to Exhaust State Court Remedies, the United States Magistrate Judge recommended that the motion be denied. On March 15, 2000, United States District Judge Mary Lou Robinson overruled Johnson's objections to the Magistrate Judge's recommendation, denied Johnson's Motion to Dismiss, and ordered that Keith's Petition for a Writ of Habeas Corpus should be determined on the merits.

IV. DISCUSSION

A. Denial of Fair and Impartial Magistrate[3]

Keith's first claim is that the trial court judge, Ron Enns, at the conclusion of Keith's first trial (Cause Number 2624), was familiar with the facts of the second case (Cause Number 2631, and the subject of this habeas petition), and had already formed an opinion that Keith was (a) a pedophile, (b) that the State had a much stronger case in the second case, and (c) that Keith would be convicted and sent to jail. (Pet. at 11.) In support of his allegation, Keith attached affidavits of jurors from Cause Number 2624, Belva McClain, Toni Watson, Bully Tate, Chad Beedy, and Bruce Broxon.[4] Keith claims that Judge Enns made comments to the jury at the conclusion of Cause Number 2624, that "the State had a much stronger case and that Petitioner would be convicted in the next trial." (Pet. at 11.) Keith further argues that Judge Enns' preconception that Keith would be convicted, denied him a fair and impartial trial, and this defect entitles Keith to be released from custody. (Pet. at 12.)

It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A necessary component of a fair trial is an impartial judge. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). A fair tribunal requires not only "an absence of actual bias . . . [b]ut to perform its high function in the

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[3] Keith refers to an impartial "magistrate," however, he is not attacking the initial appearance or arraignment in this case. Keith only addresses the conduct of the trial court judge in this petition.

[4] Keith also presented these individuals as witnesses at the habeas hearing. (Habeas Corpus Hearing Tr. at 71-79.)

best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. at 136, *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954); *Rapp v. Van Dusen*, 350 F.2d 806, 812 (3d Cir. 1965).

While Keith alleges that Judge Enns was biased, he fails to show that he was denied a fair trial or prejudiced in any way. He fails to cite to any place in the transcript of Cause Number 2631 where Judge Enns' bias was evident or affected his rulings. He fails to show that Judge Enns' familiarity with facts of Cause Number 2624 influenced rulings or decisions made in this case.[5] Additionally, Keith elected to have a jury decide not only his guilt or innocence, but also his sentence. Keith has failed to show that the comments of Judge Enns were heard by any juror in the trial of the second case. In fact, he cannot show this because the only persons present for this alleged conversation were the jurors in Cause Number 2624, and they were not eligible for service in Cause Number 2631. Additionally, Keith has failed to point to any actions of Judge Enns to influence the jury or influence the outcome of this trial. The right to a trial by an impartial jury lies at the very heart of due process. *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). Because Keith has failed to show the jury at the second trial heard any of Judge Enns' remarks at the first

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[5] Additionally, numerous courts have held that familiarity with defendants and/or the facts of the case that arise from earlier participation in judicial proceedings is not sufficient to disqualify a judge from presiding in a case. *See, e.g., United States v. Clark*, 605 F.2d 939, 941-942 (5th Cir. 1979); *Rice v. McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978); *Weber v. Garza*, 570 F.2d 511, 512 n. 1 (5th Cir. 1978); *United States v. Wolfson*, 558 F.2d 59, 62-64 (2d Cir. 1977); *United States v. Archbold-Newball*, 554 F.2d 665, 681-682 (5th Cir. 1977).

trial, or that Judge Enns' behavior at the second trial unduly influenced the jury, his claim must fail.

B. Failure to Record Interviews with Child Witnesses

Keith argues in his second point of error that the State's failure to record interviews of child witnesses abridged his right to confrontation and interfered with the effective assistance of counsel. He argues that the children. B.W., A.M.. and C.C. were interviewed by several individuals including representatives of the Texas Department of Protective and Regulatory Services, Child Protective Services, and the District Attorney's office, as well as a psychologist. According to Keith, regulations required that all interviews be recorded on audio- or videotape. However, he fails to cite to any state or agency regulations mandating taping of all interviews, nor has he cited to any constitutional requirements. He argues that there is no way to reconstruct the questioning that took place with respect to the alleged child victims, and that these tapes may have contained exculpatory material.

Contrary to Keith's assertion, audio- or videotaping of interviews with alleged victims of physical or sexual assault was not mandatory in the State of Texas in July of 1994, the date of the interviews conducted in this case.[6] At

[6] Arguably the Code does not in its amended state mandate taping of all interviews, as exceptions are provided in Chapter 261 of Title E of the Texas Family Code:

> An interview with a child alleged to be a victim of physical abuse or sexual abuse shall be audiotaped or videotaped unless the investigating agency determines that good cause exists for not audiotaping or videotaping the interview in

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that time, Texas law provided that "[t]he agency designated by the court to be responsible for the protection of children or the department shall make a complete written report of the investigation." TEX. FAM. CODE ANN § 34.05(e) (Vernon 1994). Molly Fleming, a licensed Child Protective Services specialist, testified to the creation of such a report at the trial. (Trial Tr., Vol. 5 at 388.) Further, she testified that it was not common practice in her office to record initial interviews on audio- or videotape. (Trial Tr., Vol. 5 at 394-396.)

Additionally, Fleming was called as a witness by Keith, and questioned extensively by defense counsel about her interviewing techniques, the benefits of taping interviews, and possible reasons why she did not record the interviews in this instance. (*See* Trial Tr., Vol. 5 at 387-388; 394-396.)

Contrary to Keith's allegations, there was no violation of state law or CPS regulations in this case. Additionally, Keith fails to show that the taping was constitutionally required; therefore, he cannot show an unreasonable application of Supreme Court law. He states in his brief, "[n]either the [Fifth Circuit Court of Appeals] nor the Supreme Court ha[s] ever directly addressed this problem. . . ."

> accordance with rules of the agency. Good cause may include, but is not limited to, such considerations as the age of the child and the nature and seriousness of the allegations under investigation. The fact that the investigating agency failed to audiotape or videotape an interview is admissible at the trial of the offense that is the subject of the interview.

TEX. FAM. CODE ANN. § 261.302 (Vernon 2000). (This section of the code was added in Acts 1997, 75th Leg., ch. 575, well after the date of the interviews of which Keith complains.)

(Pet. at 14.) Under 28 U.S.C. § 2254(d)(1), Keith's argument must fail because he cannot show an unreasonable application of Supreme Court law.

C. Ineffective Assistance of Counsel at the Guilt/Innocence Phase

In his third point of error, Keith alleges that trial counsel was ineffective because he (1) failed to request an "outcry" hearing; (2) failed to request a hearing to determine the "taint"/competence of the child witnesses; (3) failed to object to the state's failure to preserve exculpatory evidence; (4) failed to object to testimony regarding extraneous acts and uncharged misconduct; (5) neglected to request a proper charge; (6) failed to object to inadmissable and prejudicial evidence; and (7) failed to object to the state's improper closing arguments.

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court of the United States established a two-prong standard for ineffective-assistance-of-counsel claims. Keith must demonstrate, first, that his counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. To show that the performance was deficient, Keith must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, Keith must show that his counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Deficient performance will be found to be prejudicial only upon a showing that, but for counsel's errors, there is a reasonable probability that the final result would have been different and that confidence in the reliability of the verdict is undermined. *Lockhart v. Fretwell*, 506 U.S. 364,

369-70 (1993); *Armstead v. Scott*, 37 F.3d 202, 206-07 (5th Cir. 1994).

"Even a deficient performance does not result in prejudice unless that conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result." *Knox v. Johnson*, 224 F.3d 470, 479 (5th Cir. 2000); *see Strickland*, 466 U.S. at 687.

A defendant must show "actual prejudice" as a result of his counsel's deficient performance. *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998). Keith is required to show "that the attorney's errors were so deficient as to render the verdict fundamentally unfair or unreliable." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997); *see Lockhart*, 506 U.S. at 369. This "performance inquiry" is to be made applying a reasonableness standard, i.e., whether counsel's assistance was reasonable under all the circumstances, making the assessment, not in hindsight, but evaluating the conduct from counsel's perspective at the time of the conduct. Thus, the reviewing court is to be highly deferential in scrutinizing counsel's performance. *Strickland*, 466 U.S. at 688-89.

"The failure to prove either deficient performance or actual prejudice forecloses an ineffective assistance claim." *Green v. Johnson*, 160 F.3d 1029, 1035 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see Goodwin v. Johnson*, 132 F.3d 162, 174 (5th Cir. 1997, *am.*, 1998) (stating that the presence or absence of prejudice at either trial or appellate level hinges upon the fairness of the trial and the reliability of the verdict). Thus, it is not necessary for a district court to address both requirements of the conjunctive *Strickland* standard when addressing an ineffective-assistance claim;

such a claim may be disposed of on a petitioner's failure to meet either requirement. *Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995).

Conclusory allegations unsupported by any specific facts do not merit a federal court's attention. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (*citing Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983) ("Conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding")).

1. *Failure to request an "outcry" hearing*

Keith argues that his attorney was ineffective because he failed to request an "outcry" hearing before the victim's mother, Sonia Womack, testified. (Pet. at 18.) He argues that such a hearing is mandated under Texas law, and that such a hearing would have revealed the incompetence of the pre-trial investigatory interviews of the child witnesses and demonstrated both the paucity of reliable evidence against Keith and the untrustworthiness of B.W.'s accusations. (Pet. at 18.)

With regard to this argument, Keith concedes that "no Texas case specifically finds an "outcry" statement inadmissable because the court failed to hold a hearing on its reliability. . . ." (Pet. at 19.)

After reviewing the transcript, it is clear that while defense counsel may not have requested an "outcry" hearing, he moved for the testimony concerning the conversation between B.W. and her mother to be excluded. In this trial, defense counsel objected to the outcry statement as hearsay and the objection was initially sustained. (Trial Tr., Vol.4 at 287.) However, Judge Enns later allowed

the testimony of Sonia Womack and the outcry statement because the State had complied with all the procedural requirements of Article 38.072:

[Defense Counsel]:	Objection, Your Honor, the hearsay. Proper predicate still has not been established, exception to hearsay, and we object to it.
The Court:	Mr. Blackwell.
[The State]:	If it please the Court, Your Honor, based on the rulings of this Court in what we were requested to do, we have complied with all necessary legal requirements to go into this conversation.
The Court:	I'll overrule the objection. You may continue.

(Trial Tr., Vol. 4 at 289-290.) The transcript reveals that Sonia Womack was then questioned about the conversation she had with her daughter over the objection of defense counsel. Defense counsel made two objections to the testimony based on hearsay and both objections were overruled. Defense counsel did not ask for a running objection to Sonia Womack's testimony, but he did cross-examine Sonia Womack about her recollection of the statements B.W. made to her, her inconsistent statement to Officer Eddie Copeland, and what she asked B.W. (Trial Tr., Vol. 4 at 316.)

There is no indication in the record that defense counsel requested an "outcry" hearing.[7] However, Judge Enns' overruling of defense counsel's objection to the "outcry" statement indicates that the trial court reviewed the procedural safeguards of Article 38.072 of the Texas Code of Criminal Procedure and ruled accordingly. Keith has failed to show that, by failing to ask for an "outcry" hearing, counsel's performance was deficient. Keith has failed to show that such a hearing, if granted, would have excluded the testimony of Sonia Womack in this case.

Keith's true argument here is disagreement with the evidentiary ruling of Judge Enns allowing the "outcry" statement. However, a violation of state procedure is a basis for federal habeas corpus relief only where it amounts to a violation of due process that renders the trial as a whole fundamentally unfair. *Sawyer v. Butler*, 848 F.2d 582, 594-95 (5th Cir. 1988). As noted previously, it appears from the transcript that the court complied with procedural safeguards and defense counsel was allowed to adequately cross-examine Sonia Womack with regard to the victim's outcry statement.

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[7] In the first trial of Cause Number 2631, defense counsel made an oral motion before the court to hold an "outcry" hearing. Defense counsel noted that the district attorney had failed to comply with Article 38.072, which requires 14 days notice for use of such testimony. The court granted defense counsel's motion to exclude Sonia Womack's testimony based on the lack of notice, and no "outcry" hearing was held. (*See* Mistrial Tr., Vol. 1 at 13-18.) Judge Enns later ruled that Defense counsel had opened the door to allowing the conversation to be more fully developed when he asked Sonia Womack questions during cross-examination. (Mistrial Tr., Vol. 1 at 82.)

Keith has not established deficient performance. In addition, Keith alleges no facts to show a reasonable probability that, but for counsel's failure to request an outcry hearing, the outcome of the trial would been different. Keith's claim, therefore, should be denied.

2. *Failure to request a "taint"/competency hearing*

Keith argues that trial counsel was ineffective because he should have moved the trial court to hold a "taint"/competency hearing, outside of the presence of the jury, to determine the competence of the minor complainant to testify in this case.

Keith's argument is without merit. The trial court judge specifically took notice of a prior hearing in which he found both B.W. and A. M. competent to testify:[8]

The Court:	We'll come to order at this time. Let the record reflect the jury is not in the courtroom at this time.

[8] At the initial trial of Cause Number 2631, outside the presence of the jury, B.W. was questioned by Judge Enns concerning her background, her age, where she lived, where she went to school, and whether she knew the difference between a lie and the truth. (Mistrial Tr., Vol. I at 125-127.) Judge Enns also questioned her with regard to possible "tainting" of her recollection by other persons. (Mistrial Tr., Vol. I at 127.) Counsel was also given the opportunity to ask any additional questions. (Mistrial Tr., Vol. I at 128.) Furthermore, during cross-examination, defense counsel questioned B.W. about whom she had talked to and the questions they may have asked her. (Mistrial Tr., Vol. I at 142-147; 148-150.)

During the break, Counsel and the Court had an informal discussion concerning the procedure on call of the State's witnesses. [B.W.] and [A.M.] are both minor children. And the Court recalls that at a prior trial of this proceeding between State's counsel – involving State's counsel and Defense counsel and this defendant, both of these child witnesses were tendered as witnesses outside the presence of the jury, and the Court went through qualifying questions with both of these children at that time. Either counsel have any problem with the Court taking notice of those – those prior questions outside the presence of the jury for purposes of this trial?

[The State]: So long as the Court will then deem them both competent to testify and Mr. Roper will agree they're competent to testify.

[Defense Counsel]: We have no objection to that procedure.

The Court: Very well. Court will accept that. And again, I'm not mandating that to anyone, but that was just the gist of our conversation in chambers, and it might save everybody a little time in these proceedings.

[The State]:	So the Court is going to deem them both –
The Court:	The Court will continue the same rulings that were in the prior proceedings and deem them both competent to testify at this time.

(Trial Tr., Vol. 4 at 326-327.) Keith cannot show prejudice from a failure to hold an additional competency hearing. Additionally, he cannot show that B.W. was not qualified to testify under Rule 602. For this reason, his claim must fail.

3. *Failure to object to the State's failure to preserve exculpatory evidence*

Keith argues that he received ineffective assistance of counsel because his attorney failed to object to the state's failure to audio- or videotape the interviews with B.W., which he claims would have been exculpatory. (Pet. at 44.)

The state was under no obligation to tape the interview with B.W., and, therefore, any objection would have been futile. An attorney is not required to raise meritless objections. *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994), *cert. denied*, *Clark v. Scott*, 513 U.S. 966 (1994); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections"); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984) (per curiam).

Keith has failed to show that counsel was objectively unreasonable for failing to object to the State's failure to tape the interview with B.W.; therefore, he cannot show deficient performance. Further, defense counsel made a

strategic decision to examine Fleming on direct as to her techniques for interviewing (Trial Tr., Vol. 5 at 383-392; 419-420; 423-424), her failure to record the interview (Trial Tr., Vol. 5 at 386-388; 392-396), the destruction of her notes of the interview (Trial Tr., Vol. 5 at 387-388), and the completeness of her report (Trial Tr., Vol. 5 at 420-422). Keith has not addressed this issue of strategy.

For these reasons, his claim must fail.

4. *Failure to object to testimony regarding extraneous acts and uncharged misconduct*

Keith argues that his attorney was ineffective because he failed to object to testimony regarding extraneous acts and uncharged misconduct, allowing the jury to hear testimony that was unfairly prejudicial. Keith cites to several examples of evidence of extraneous offenses to which he contends his trial counsel should have objected. He complains of the following evidence: (1) Sonia Womack, the "outcry" witness, testified about details B.W. had told her about Keith's sexual assaults on all three girls; (2) Molly Fleming testified to details B.W. told her about Keith's sexual assault on all three girls; (3) A.M. testified to sexual acts committed on her by Keith, and acts committed on C.C. and B.W.; (4) B.W. testified to acts committed by Keith against all three girls, and (5) B.W. testified to sexual acts committed on her by Keith that were outside the scope of the indictment.

Keith concedes that Defense counsel asked for and was granted a motion *in limine* in pre-trial proceedings, asking for the State to provide statutory notice of other crimes they planned to offer, to advise why the other acts were being offered, and to require the State to approach

the bench prior to introducing any evidence of extraneous acts or offenses. (Pet. at 51.) It is also clear from the record that defense counsel was put on notice that the prosecution planned to offer testimony from the acts indicted in Cause Number 2624 and each and every act of sexual misconduct between Keith and A.M. and C.C. (Trial Tr., Vol.1 at 6-7.) Keith notes that defense counsel never objected to the testimony concerning extraneous acts and never forced the district attorney to approach the bench. At the habeas hearing, Dean Roper, defense counsel for Keith in Cause Number 2631, testified that he did not object or force the prosecutor to approach the bench because the testimony involved an incident that occurred when all three girls were present, or the same transaction. (Habeas Tr. at 106.) Roper noted that he believed if he had forced the prosecutor to come up and respond to an objection, it would have been futile. (Habeas Tr. at 106.)

The state court made no findings on this issue.

The admission of evidence is a matter within the discretion of the trial court. *See Montgomery v. State*, 810 S.W.2d 372, 378 (Tex.Crim.App.1990) (op. on reh'g.). Evidence of "other crimes, wrongs, or acts" may be admissible if it has relevance to a material issue other than to show that the accused acted in conformity with some trait of character. *Id.* at 387; Tex.R.Evid. 404(b). The evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex.R.Crim.Evid. 404(b); *Montgomery*, 810 S.W.2d at 388. Extraneous offense evidence may be relevant and admissible to rebut a defense theory. *See Ransom v. State*, 920 S.W.2d 288, 300 (Tex.Crim.App. 1994).

Although relevant, evidence of other acts may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or if it would cause undue delay or needless presentation of cumulative evidence. Tex.R.Crim.Evid. 403.

The admissible evidence in this case showed that B.W. was present at Keith's house because she was visiting her grandmother and had made friends with A.M. and C.C. Keith is the stepfather of C.C. B.W. testified that she, C.C., and A.M. were playing at Keith's house and all three girls went into the living room where Keith exposed himself to all three girls. B.W. testified that all three girls went into the bedroom together where all played with Keith's penis. She testified that C.C. put her mouth on Keith's penis and instructed her to do the same. B.W. testified that Keith touched all three girl's vaginas.

The extraneous acts to which Keith refers occurred in the presence of all three girls and occurred on this one occasion. This evidence was admissible as same transaction contextual evidence. Also, because the extraneous acts described the pattern of abuse and it would be impossible to relate the facts, including why B.W. would be at the home of Keith on the day of the incident, without relating those extraneous acts, the testimony was admissible. The extraneous offenses in question tended to show the context in which the primary criminal act occurred, to prove scienter, intent and guilty knowledge, to prove state of mind, and to refute or rebut a defensive theory. *See Albrecht v. State*, 486 S.W.2d 97 (Tex.Crim.App. 1972); *Wiggins v. State*, 778 S.W.2d 877 (Tex.App. – Dallas 1989, pet. ref'd).

Additionally, the girls' credibility and their recollection of events was put into issue by the defense. In opening statement, defense counsel stated that the girls were suffering from pseudotrauma and that their recollections were tainted by outside influences. The testimony concerning Keith's conduct on the date in question was admissible to show Keith's opportunity, plan, identity, and absence of mistake in molesting B.W. A.M.'s testimony was that of an eyewitness to the events charged in the indictment. She testified that she, C.C., and B.W. were present on the day in question, that Keith was the perpetrator, and that she witnessed the sexual assault on B.W. In a case such as this, where the victim's credibility is called into question, evidence consistent with a complainant's testimony is relevant, entirely apart from character conformity, to rebut that theory. *See Montgomery v. State*, 810 S.W.2d 372, 387-88 (Tex.Crim.App.1991); *see also Taylor v. State*, 920 S.W.2d 319, 321 (Tex.Crim.App.1996).

As to Keith's claim that the testimony of B.W. concerning acts outside the scope of the indictment were inadmissible extraneous acts, this claim must fail. At the time of this case, an important exception to the general rules regarding extraneous offenses governed admission of such evidence when the offenses involved sexual abuse or offenses against children of tender age. Precedents had recognized an exception to the general rule which permits the admission of similar sexual offenses that occurred between the victim-complainant and the accused to shed light and reveal the circumstances surrounding the act

which was indicted or charged against the accused.[9] *See Gass v. State*, 785 S.W. 2d 834, 836-37 (Tex.App. – Beaumont 1990). The extraneous offenses of which Keith complains tended to show the context in which the principal criminal act occurred, to prove scienter, intent or guilty knowledge, to prove state of mind, and to refute or rebut a defensive theory, and were, therefore, admissible. *See Albrecht v. State*, 486 S.W.2d 97 (Tex.Crim.App. 1972); *Wiggins v. State*, 778 S.W. 2d 877 (Tex.App. – Dallas 1989, pet.ref'd). Keith has failed to show that counsel's performance was deficient for failure to object to clearly admissible evidence.

Keith also argues that even if the extraneous acts were relevant, they should have been excluded as overly prejudicial under Rule 403, and counsel was ineffective for failing to make this objection. It is true that these acts were prejudicial because they tended to show that Keith was guilty of the offense charged; however, their relevance far outweighed their prejudicial value.

In habeas actions, courts do not sit to review the admissibility of evidence under state law unless erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding. *Little v. Johnson*, 162 F.3d

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[9] This precedent was later codified in statute. See TEX.CODE CRIM.P.ANN. art. 38.37. Contrary to Keith's assertion, Article 38.37 is not applicable to this case, as it was added to the Code of Criminal Procedure in 1995. The legislature provided that Article 38.37 "applies to any criminal proceeding that commences on or after the effective date of this Act." Acts of June 5, 1995, 74th Leg., R.S., ch. 318, § 48(b), 1995 Tex. Gen. Laws 2748, 2749. The Act's effective date was September 1, 1995. The prosecution of Cause Number 2631 ended on August 3, 1995.

855, 862 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1768 (1999). Thus, the erroneous admission of prejudicial testimony does not justify habeas relief unless the evidence played a "crucial, critical, and highly significant" role in the jury's determination. *Id.* The testimony concerning acts committed by Keith on all three girls addressed the issue of "pseudo-trauma" and reliability of B.W.'s recollection. In addition to the disputed testimony, there was direct testimony from B.W. concerning the act alleged in the indictment. Under Texas law, the testimony of a victim standing alone, even when the victim is a child, is sufficient to support a conviction for sexual assault. *Ruiz v. State*, 891 S.W. 2d 302, 304 (Tex.App. – San Antonio 1994, pet. ref'd.). Therefore, the testimony concerning other acts committed on the same day was not "crucial, critical, or highly significant" to the jury's affirmative response to the question of whether or not the sexual assault occurred. Accordingly, no relief is warranted.

5. *Failure to request a proper jury charge*

Keith argues that defense counsel was ineffective because he failed to request a jury charge, as well as failed to object to an incomplete jury charge. Specifically, Keith complains that his counsel failed to request a definition of penetration, an element of the offense charged; an instruction concerning the weight of expert testimony; and the lack of an instruction concerning extraneous offenses being admitted for a limited purpose. (Pet. at 53.)

Keith fails to cite to any authority holding that a failure to include these instructions constitutes constitutional error. As a general rule, the mere fact that the trial court fails to elaborate or enlarge its instructions beyond

setting forth the statutory elements of the offense does not constitute constitutional error. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), *cert. denied*, 452 U.S. 907 (1981). In this case, the charge clearly set forth the statutory elements of the crime. Additionally, defense counsel's theory of the case was that the incident did not occur, not that although there was some contact with B.W.'s mouth, it did not meet the statutory definition of penetration. The only testimony was by B.W. that she, in fact, put Keith's penis in her mouth. Keith has failed to show how that raised a fact issue with regard to penetration.[10]

For these reasons, his claim must fail.

6. *Failure to object to inadmissible and prejudicial evidence*

Keith argues that his attorney was ineffective because he failed to object to inadmissible and prejudicial testimony from Priscilla Kleinpeter and Molly Fleming. Specifically, he argues that defense counsel allowed, without objection: (1) Kleinpeter to testify on the truthfulness of the children; (2) Fleming to testify on "pseudo-trauma"; and (3) Kleinpeter to testify as an expert witness for the state. (Pet. at 54.)

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[10] Keith implies that defense counsel should have asked for an instruction on penetration due to the fact that the alleged penetration in this case occurred with a towel placed over Keith's genital area. However, according to Texas State Law, mere interposition of layer of fabric does not prevent occurrence of sexual contact, for purposes of indecency with child. *Guia v. State*, 723 S.W.2d 763 (Tex.App. – Dallas 1986, *pet. ref'd*).

The Texas Court of Criminal Appeals, which reviewed Keith's direct appeal, found that the questions to which objection was raised were asked after Keith had (1) informed the jury during opening argument that he proposed to show that B.W. was "telling a story that [she had] grown to believe," and (2) interrogated the TDPRS worker about the proper techniques for interviewing children. For instance, he inquired whether it was important to conduct "those interviews in a manner that is not oversuggestive to the child," whether the interviewer "should not reflect to them that if they give . . . a response that that's not an acceptable response," what an "agenda prior to interviewing that child" could influence the questions and answers, whether it was important to "know that nobody else has influenced that child," whether the "child could actually . . . have been influenced prior to ever getting to you for the initial interview," whether "you would look to see if somebody, for their own motive, had made a conscious . . . attempt to influence the child," whether one must have "a conscious intent to influence that child" to influence him, whether B.W.'s parents were interviewed "prior to beginning your interview to see what [previous] discussions had taken place with the child," and whether "specific" as opposed to "open-ended" questions were more likely to influence a child's potential testimony. *Keith v. State*, No. 07-95-0306-CR, slip op. at 11-12.

Additionally, the court found that when Keith propounded the aforementioned questions, he had already questioned B.W.'s mother about whether she had asked her daughter "specific questions about what [Keith] supposedly did to her" and whether as a result of these "specific questions" B.W. responded that he "put his penis in [B.W.'s] mouth." *Id.* He also asked the mother whether

she knew that what her child allegedly told her differed from what was told the TDPRS employee. *Id.*

The foregoing indicates that a portion of Keith's defense consisted of an effort to impeach the credibility of B.W.'s and her mother by insinuating that the mother had influenced or coached B.W.'s testimony. The record shows that Keith himself opened the door through which the State passed by asking the questions it did. In short, Keith cannot complain of the evidence at issue since it tended to rebut the defense efforts to impeach the State's primary witnesses. *See Credille v. State*, 925 S.W.2d 112, 116 (Tex. App. – Houston [14th Dist.] 1996, no pet. h.) (holding that when "defense counsel pursues a subject that would ordinarily be outside the realm of proper comment by the prosecutor, the defendant opens the door and creates a right of reply for the State").

The record also contradicts Keith's assertion that Kleinpeter was allowed to testify to the truthfulness of B.W. without objection. Johnson points out in his brief that defense counsel objected twice to Kleinpeter's testimony on this very ground. (Tr. 490, 491.)[11]

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[11] [Defense Counsel]: Objection, Your Honor. We object to the question inasmuch that it's not permissible for an expert witness to give an opinion as to the truthfulness of the child witness. And to ask that question at a minimum is trying to back door and get this expert to give an opinion as to the truthfulness of the child. And we object to that question.

The Court: Court will overrule that objection. You may continue.

(Trial Tr., Vol. 5 at 490.)

Similarly, Keith's allegation that Fleming was permitted to testify about the truthfulness of B.W.'s statements is without merit. Defense counsel objected to Fleming's testimony on the basis of trying to elicit an opinion on whether or not she believed B.W. was telling the truth. (Trial Tr., Vol. 5 at 414-415.) Keith also argues that Fleming was permitted to testify as to whether or not Fleming believed B.W. was suffering from pseudo-trauma without objection. The record shows that defense counsel did not object to the question but did cross-examine Fleming extensively concerning her background, basis for the conclusion, and questioning techniques of B.W. (Trial Tr., Vol. 5 at 417-420.) Keith ignores this issue of trial strategy.

Keith's final argument concerns allowing Kleinpeter, a licensed marriage and family therapist and licensed psychological associate, to testify as the State's expert. He argues that defense counsel should have exercised its "*Daubert* 'gatekeeper function' and determine the competence of such 'expert' to testify at trial." (Pet. 54.) Keith fails to recount that Kleinpeter was called as a rebuttal witness for the State after the testimony of his own expert, Steven Baca, also a licensed marriage and family therapist. (See Trial Tr., Vol. 5 at 435-473.) Keith fails to show that Kleinpeter's testimony was not qualified under *Daubert* or the Texas equivalent *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) (en banc) or Rule 702 of the Texas Rules of Criminal Evidence. He also fails to show that counsel's actions were objectively unreasonable.

7. *Failure to object during State's closing arguments*

Keith argues that defense counsel was ineffective because he failed to object on two separate occasions when

the state offered its assurances to the jury that B.W. was truthful. (Pet. at 65.) He argues that the State's comments improperly bolstered B.W.'s testimony. (Pet. 66.) Lastly, Keith argues that the State's statements during closing created the impression that C.C. was afraid to come to court and to confront Keith, and defense counsel failed to object. (Pet. at 66.)

The purpose of closing argument is to facilitate the jury's proper analysis of the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the admitted evidence alone. *Campbell v. State*, 610 S.W.2d 754, 756 (Tex.Cr.App. [Panel Op.] 1980). To be permissible, jury argument must fall within one of the following four general areas: (1) summation of the evidence presented at trial; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's argument; or (4) plea for law enforcement. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex.C.App.1997).

Improper jury argument constitutes reversible error only if, in the light of the entire record, the argument is extreme or manifestly improper, violates a mandatory statute, or injects into the trial new facts which are harmful to the accused. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex.Cr.App.1996).

The prosecutor told the jury to consider the evidence, and the court admonished the jury that the arguments of counsel were not evidence. The prosecution's statements that "there's no coaching here" was within the purview of

proper argument.[12] An objection would have been without merit. *Koch v. Puckett*, 907 F.2d at 527 ("counsel is not required to make futile motions or objections.") As to Keith's second argument, that the prosecutor improperly vouched for B.W. by stating that she "came here to tell the truth," this argument must also fail. A prosecutor may not personally vouch for the credibility of the government's witnesses, *United States v. Washington*, 44 F.3d 1271, 1278 (5th Cir. 1995), *cert. denied*, 514 U.S. 1132 (1995); however, it is permissible for a prosecutor to recite to the jury the inferences and conclusions he wishes to draw, including which witnesses are credible. *Id.* Additionally, a prosecutor may state his own opinion or knowledge of the case so long as he makes it clear that the "conclusions he is urging are conclusions to be drawn from the evidence." *United States v. Morris*, 568 F.2d 396 (5th Cir. 1978). Here, the prosecutor's comments taken as a whole show he was urging the jury to find B.W. was telling the truth about the incident.[13]

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[12] The entire statement made by the prosecutor during closing argument was:

> When you discuss the evidence in this case and the testimony that you have heard from the people that know what is going on, that either had contact with the facts and circumstances of this sexual abuse or that had contact with [B.W.], have told you that there is no pseudotrauma here, there's no coaching here, they've seen this in person.

[13] The prosecutor's entire comment at closing was:

> And I submit to you that [B.W.] came in here to tell you the truth, and the truth is – the truth is – that the defendant in this case on or about June the 1st of 1991 committed the offense of aggravated sexual assault, not based on what I say, not based on some legal argument, but based on the facts

(Continued on following page)

Keith's argument that defense counsel was ineffective for failing to object to the State's references to C.C. in closing argument is also without merit. The prosecutor did not refer to C.C. in his opening statement. Defense counsel argued inferences from C.C.'s failure to testify for the State. He stated that the jury could "logically conclude that the reason [C.C.] wasn't here is because it didn't happen. It did not happen. She would not come in here and say that happened." (Trial Tr., Vol. 5 at 524.) In rebuttal, the prosecutor argued reasonable inferences from Keith's failure to call C.C. as a witness. (Trial Tr., Vol. 5 at 532-33.) On all points Keith has failed to show deficient performance. In addition, Keith alleges no facts to show a reasonable probability that, but for counsel's failure to object, the outcome of the trial would have been different.

E. Ineffective Assistance of Counsel During Punishment Phase

Keith argues that defense counsel was ineffective during the punishment phase of his trial because he failed to object to the State's closing argument with regard to extraneous offenses and uncharged misconduct. He further argues that counsel's errors during the guilt/innocence phase harmed Keith during the punishment phase.

The standard for review for ineffectiveness during the punishment phase of trial is that of *Spriggs v. Collins*, 993 F.2d 85 (5th Cir. 1993). Under this standard, Keith must

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that you heard in this courtroom, and the unescapable facts that you're going to use to decide this case.

(Trial Tr., Vol. 5 at 519.)

demonstrate that there is a reasonable probability that, but for counsel's errors, his sentence would have been "significantly less harsh." *Id.* at 88.

Keith fails to show that the prosecution's argument at sentencing was improper. He cites no case law to support his assertion that the prosecutor's statements were improper, nor does he cite to any support for the proposition that such comments constitute reversible error. Additionally, as noted previously, Keith has failed to show the conduct mentioned by the prosecutor did, in fact, constitute extraneous offenses. To the extent that Keith's argument is that the abundance of errors in the guilt innocence phase of trial "may have affected the length of" Keith's sentence, this claim must be dismissed. Based on the facts of this case and the evidence presented, Keith cannot prove ineffective assistance of counsel during the guilt/innocence phase of the trial. Because Keith has not alleged that but for this argument at the sentencing phase of his trial, his sentence would have been significantly less, his claim must fail.

F. Ineffective Assistance of Counsel on Direct Appeal

Keith argues that he received ineffective assistance of counsel on appeal. Specifically, he argues that his attorney failed to: (1) present and argue the issue of whether trial counsel "opened the door" to the prosecution's expert on the truthfulness of the complaining witness; (2) argue that the State's improper interviewing techniques permanently tainted the complainant's testimony; (3) raise on appeal the judge's bias against the defendant; (4) contest the lack of proper jury instructions; (5) raise on appeal the prosecution's improper closing arguments in both phases of the

trial; and (6) address the improper vouching for the credibility of witnesses in the Petition for Discretionary Review. (Pet. at 69-71.)

A criminal defendant is constitutionally entitled to the effective assistance of counsel on direct appeal where the appeal is a matter of right under state law. *Evitts v. Lucey*, 469 U.S. 387 (1985). Counsel's performance on appeal is measured using the same standards applied to trial counsel under *Strickland*. Under *Strickland*, Keith must prove that his attorney's performance was deficient and that he was actually prejudiced by counsel's acts or omissions on appeal. *Penson v. Ohio*, 488 U.S. 75, 84 (1988). Keith "must satisfy both prongs of the Strickland test in order to prevail on his claim of ineffective assistance of appellate counsel." *Smith v. Robbins*, 528 U.S. 259, 289 (2000).

1. *Failure to present and argue issue of whether trial counsel "opened the door" to the prosecution's expert on the truthfulness of the complaining witness*

Keith argues that counsel on appeal failed to present and argue the issue of whether trial counsel "opened the door" to prosecution's expert on the truthfulness of the complaining witness. Keith's claim lacks merit.

On appeal, counsel presented six points of error including the admission of opinion testimony concerning one of the victims. Specifically, counsel questioned the trial court's decision to permit the State to ask two witnesses whether B.W. "show[ed] any signs of having been coached." The witnesses to whom the question was posed consisted of an employee of the Texas Department of Protective and

Regulatory Services (TDPRS) and a licensed psychological associate. Both had interviewed B.W. The Court of Appeals for the Seventh District of Texas found that defense counsel had opened the door to such statements by insinuating that the mother had influenced or coached B.W.'s testimony. Keith's point of error was overruled because the evidence he complained of tended to rebut his efforts to impeach the State's primary witness.

Because Keith's appellate counsel directly attacked the admission of the opinion testimony, he cannot show prejudice from a failure to present the argument that defense counsel did not in fact "open the door" for this evidence to come in.

2. *Failure to argue that the state used improper interviewing techniques*

Keith argues that his appellate attorney was ineffective for failing to raise the state's improper interviewing techniques. Keith has failed to establish improper techniques were used. *See* previous discussion in Section IV.C.3. of this Report and Recommendation. Additionally, Keith fails to show how his trial was rendered fundamentally unfair since defense counsel was allowed to examine witnesses extensively, on the issue of proper interviewing techniques.

3. *Failure to raise alleged judicial bias*

Keith waived this point of error at the habeas hearing, conceding that Dean Roper would not have known about the statements of Judge Enns to the jurors in Cause Number 2624. (Habeas Corpus Hearing Tr. at 121.)

4. *Failure to contest the lack of proper jury instructions*

Keith argues that his appellate attorney was ineffective because he failed to contest the lack of proper jury instructions. (Pet. at 70.) Because the jury instructions were constitutionally sufficient (see prior discussion in Section IV. C. 5. of the Report and Recommendation), and the lack of a "penetration" instruction did not render his trial fundamentally unfair, *Goodwin v. Johnson*, 132 F.3d 174 (5th Cir.), this allegation must fail. Further, counsel is not ineffective for failing to raise a meritless claim, *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997); therefore, Keith cannot show prejudice on appeal.

5. *Failure to raise on appeal the prosecution's improper closing arguments in both phases of the trial*

Keith argues that his appellate attorney rendered ineffective assistance of counsel because he did not raise the issue of the prosecution's improper arguments regarding extraneous offenses. (Pet. at 70.) Because the prosecution's arguments were constitutionally sufficient (see prior discussion, IV.C.7.), Keith cannot show that he was denied a fundamentally fair trial, *Goodwin*, 132 F.3d at 174, and his claim must fail. Additionally, counsel is not ineffective for failing to raise a meritless claim, *Green*, 116 F.3d at 1125, therefore, Keith cannot show prejudice on appeal.

6. *Failure to address the improper vouching for the credibility of witnesses in the Petition for Discretionary Review*

Keith argues that he received ineffective assistance of appellate counsel because he failed to raise the "vouching" issue in his petition for discretionary review. (Pet. at 70.) In Texas, review by the Texas Court of Criminal Appeals is discretionary; therefore, appellants have no right under the Fourteenth Amendment to have counsel file a petition for discretionary review. *Ayala v. Texas*, 633 S.W. 2d 526, 528 (Tex. Crim.App.1982). Therefore, Keith's claim must fail. Having no right to appellate counsel, he cannot have been deprived of effective assistance of counsel at the petition for discretionary review stage. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982).

Additionally, Keith has failed to show that the Texas Court of Criminal Appeals' denial of his claim of ineffective appellate counsel is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Further, Keith has failed to show that he was prejudiced by appellate counsel's failure to raise these issues on direct appeal.

V. CONCLUSION

For the foregoing reasons, it is the recommendation of the United States Magistrate Judge to the United States District Judge that the Petition for a Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Jerry Keith be, in all things, **DENIED**.

VI. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

The United States District Clerk is directed to send a file-marked copy of this Report and Recommendation to petitioner and a copy to respondent's attorney of record by U.S. regular mail. Any party may object to the proposed findings, conclusions, or recommendation within fourteen (14) days after its filing. 28 U.S.C. § 636(b); Rule 8(b)(3) of the Rules Governing Section 2254 cases in the United States District Courts. Any such objections shall be in writing and shall specifically identify the portions of the findings, conclusions, or recommendation to which objection is made, and set out fully the basis for each objection. Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on the Magistrate Judge and all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions set forth in this report and accepted by the District Court. *Douglas v. United Services Auto. Assn*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

It is so recommended.

Dated: August 15, 2001.

/s/ Nancy M. Koenig
NANCY M. KOENIG
United States
Magistrate Judge

APPENDIX F

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. 39,905,01
STYLE: Jerry Brian Keith
TRIAL COURT NO: 2631-1W

February 10 1999

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

TROY C. BENNETT, CLERK

JERRY BRIAN KEITH TDC#
C/O L T BRADT PC
6303 FELDSPAR
HOUSTON TX 77092

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-11252

JERRY BRYAN KEITH

Petitioner-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Amarillo

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(Filed Feb. 10, 2003)

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 1/15/03, 5 Cir., ___, ___ F.3d ___)

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this case en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX H

AMENDMENT VI. JURY TRIALS FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to

vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) a copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel

under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

TX CRIM PRO Art. 38.072

Vernon's Ann.Texas C.C.P. Art. 38.072 (Vernon Supp. 2002)

Art. 38.072. Hearsay Statement of Child Abuse Victim

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child 12 years of age or younger:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Prohibited Sexual Conduct); or

(3) Section 43.25 (Sexual Performance by a Child).

Sec. 2. (a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

WRIT OF HABEAS CORPUS

AFFIDAVIT OF FACT

My name is Bully "Butch" Tate; I am over 18 years of age; I have never been convicted of a crime and am giving this limited statement freely, without threat or promises from anyone. For future references my Texas Drivers license number is B.T. 04991226. My home phone number is 806-948-5560; my office number is 806-948-4280; and my mobile phone number is 806-930-0016. My home address is 211 Ave N, Sunray, Texas. I do solemnly swear that the below statement is true and accurate to the best of my knowledge at this time. Any further information that may be requested from me will have to be obtained by subpoena for me to comment any further.

I was a juror in the Criminal Trial of Jerry Bryan Keith, Case #2624 which began April 3, 1995. After we were completely through with our deliberations and sentencing Judge Enns entered the room and talked with us. He stated that we had done what we had to do and that Mr. Keith would be convicted in the next trial. He did say that pedophiles never straighten up and the only way they do is to go prison.

I swear and affirm that this is the truth to the best of my knowledge at this time.

/s/ Bully L. Tate
Bully Tate – Affiant

STATE OF TEXAS X
X
COUNTY OF JEFFERSON X

SUBSCRIBED TO AND SWORN TO before me by Bully Tate on this the 11th day of September, 1998.

/s/ LinMarie Garsee
NOTARY PUBLIC,
STATE OF TEXAS

[SEAL] LINMARIE GARSEE
MY COMMISSION
EXPIRES
OCTOBER 21, 2001

AFFIDAVIT OF FACT

My name is Chad Beedy; I am over the age of 18 years; I have never been convicted of a crime and am fully aware, cognizant and capable of making this affidavit of fact. I am employed by DeKalb Seed in Dumas, Texas. For future references my Texas Drivers License number is 11860876. My home phone number is 935-4124; and my work phone number is 935-5623. My home address is 702 C.B. Elm Dumas TX. I am making this statement of my own freewill. No one has promised me anything nor threatened me in any way into making it. I do solemnly swear that the information contained herein is true and correct to the best of my knowledge.

On April 3, 1995, I served on a jury in the Criminal Trial of Jerry Bryan Keith, Case #2624. During our deliberations one older lady, I believe her name to be Rheta Hill kept trying to bring in information that was not

presented at the trial. Our foreman kept telling her that she couldn't do this. She kept asking how long would he serve if he was convicted; what would he have to do during the probation time. There were questions about the Keith family financial status. There were questions concerning why Mr. Keith did not testify in his own defense.

After we had rendered our verdict Judge Enns came in and spoke with us. He told us that we did what we had to do; the State had a weak case; that Mr. Keith had future trials and would probably go to prison. He also stated something to the fact that pedophiles never straighten up and that Mr. Keith would be back in court anyway. He also stated that there were things that couldn't be brought up in this trial but that the State had a stronger case in the next one and these facts would be brought up at that time.

At this time, this is all that I can recall at this time. However, should I recall more information I will contact the proper persons. I do solemnly swear and attest that this information is true and correct.

/s/ Chad Beedy
CHAD BEEDY – AFFIANT

State of Texas X
X
County of Jefferson X

SUBSCRIBED TO AND SWORN TO before me by Chad Beedy on this the 11th day of September, 1998.

/s/ LinMarie Garsee
NOTARY PUBLIC,
STATE OF TEXAS

[SEAL] LINMARIE GARSEE
MY COMMISSION
EXPIRES
OCTOBER 21, 2001

AFFIDAVIT

I, Bruce Broxson, do solemnly swear that I am a resident of Moore County, Texas. I am over eighteen years of age, never been convicted of a crime and am fully competent to make this affidavit.

I further swear that I was a juror in the Criminal Trial of Jerry Bryan Keith, Case # 2624 which started on April 3, 1995 and ended on April 6, 1995 before the Honorable Ron Enns, Moore County Courthouse.

Several issues have caused me concern, since the verdict, as to whether or not Jerry Bryan Keith received a fair trial.

1.) Most if not all of the jurors knew or knew of Mr. Keith and/or his family.

2.) Even after being instructed not to do so, the jury still questioned and discussed the fact that Mr. Keith did not testify in his own defense.

3.) The financial status of the Keith family was discussed.

4.) Mr. Keith's lawyer never proved Mr. Keith was innocent.

Further, comments made by the Judge after our verdict have caused me concern as to whether or not Jerry

Bryan Keith received a fair trial with Judge Enns. Specifically, Judge Enns came in and spoke with the jurors and relayed to us the following:

1.) That we, the jury, did what we had to do.

2.) That the State had a weak case with very little to go on.

3.) That there were several facts that could not be brought up in this trial.

4.) That these facts would be brought up in a second trial in which the State/Prosecution had a much stronger case.

5.) That Mr. Keith would be convicted in the next trial and go to prison.

6.) That pedophiles never straighten up and that Mr. Keith would be back in court anyway.

/s/ Bruce Broxson
Affiant

STATE OF TEXAS)
)
COUNTY OF RANDALL)

SUBSCRIBED TO AND SWORN TO before me by BRUCE BROXSON on this 23 day of July, 98.

/s/ Jesus Ramos Jr.
Notary Public,
State of Texas

[SEAL]	JESUS RAMOS JR NOTARY PUBLIC STATE OF TEXAS My Commission Expires [Illegible]